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CRIMINAL LAW—UNITED STATES v CANINO AND THE CONTINUING CRIMINAL ENTERPRISE: DO DRUG KINGPINS HAVE A RIGHT TO SPECIFIC JUROR AGREEMENT?

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NOTES

CRIMINAL LAW—*UNITED STATES V. CANINO* AND THE CONTINUING CRIMINAL ENTERPRISE: DO DRUG KINGPINS HAVE A RIGHT TO SPECIFIC JUROR AGREEMENT?

INTRODUCTION

One might assume that in federal criminal trials, a convicting jury must agree on the crime or crimes that the defendant committed. As one court put it, "[u]nanimity is an indispensable element of a federal jury trial."[1] Absolute unanimity is not guaranteed, however, especially when the case involves a complex statutory crime. Take, for example, a case in which the criminal defendant, "DD," is accused of committing the crime of "A." Commission of that crime involves essentially two acts, "B" and "C." Moreover, committing "C" requires the commission of three predicate acts. Six of the jurors find DD guilty of three particular acts, which satisfy part "C" of the crime, while the other six find "DD" guilty of three entirely different acts which satisfy "C." All twelve agree that "DD" is guilty of crime "A." May the jury return a guilty verdict and convict "DD?"

The Continuing Criminal Enterprise statute ("CCE")[2] describes a complex crime much like the crime of "A" in the aforementioned hypothetical. In *United States v. Canino*,[3] the United States Court of Appeals for the Seventh Circuit affirmed the validity of the defendant's conviction under the CCE without requiring specific juror unanimity on the statute's "continuing series" element.[4] The United States Court of Appeals for the Third Circuit, however, in *United States v. Echeverri*,[5] required specific unanimity with respect to the "continuing

1. United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978); *see also infra* notes 55-56 and accompanying text.

2. 21 U.S.C. § 848 (1988). The Continuing Criminal Enterprise provision was enacted as part of title III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (1988)).

3. 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

4. *Id.* at 947.

5. 854 F.2d 638 (3d Cir. 1988).

series" element.[6] This Note will consider these two conflicting decisions and how the jury unanimity requirement interacts with the CCE.

Section I addresses the components of the CCE, its purpose, the circumstances surrounding its enactment, and the requirement of jury unanimity in federal criminal trials. Section II discusses the conflicting cases on the issue of jury unanimity with respect to the "continuing series" element of the CCE. It reviews the facts and reasoning of the Seventh Circuit's decision in *United States v. Canino*,[7] as well as the Third Circuit's decision in *United States v. Echeverri*.[8] Section III analyzes the present state of the law on the issue of juror divergence with regard to the underlying factual elements of a charged offense. It examines the due process implications of juror disagreement and discusses the recent Supreme Court decision, *Schad v. Arizona*,[9] which considered factual divergence among jurors in terms of a state's first degree murder statute. Section III also compares the CCE to the Racketeer Influenced and Corrupt Organizations Act ("RICO")[10] and discusses the treatment of jury unanimity in RICO cases. Finally, this Note concludes that the jury should be required to agree, by a substantial majority, on the underlying predicate acts that establish a "continuing series of violations" under the CCE and that the use of special verdicts would serve to assure such agreement.

I. BACKGROUND

A. *The Continuing Criminal Enterprise Statute*

The CCE was originally drafted as part of the Drug Abuse Prevention and Control Act of 1970 (the "Act").[11] Congress enacted the Act which amended the Public Health Services Act and similar laws.[12] The purpose of the Act was threefold: (1) to provide authority to increase drug abuse prevention and user rehabilitation efforts, (2) to supply more effective law enforcement means to carry out drug abuse prevention and control measures, and (3) to establish an overall plan

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6. *Id.* at 643; *see infra* text accompanying note 84.

7. 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

8. 854 F.2d 638 (3d Cir. 1988).

9. Schad v. Arizona, 111 S. Ct. 2491 (1991).

10. 18 U.S.C. §§ 1961-1968 (1988). The Racketeer Influenced and Corrupt Organizations Act was enacted as title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

11. Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801-971 (1988)). This Act compiled over 50 drug control laws into a single comprehensive regulatory scheme. H.R. REP. NO. 1444, 91st Cong., 2d Sess., pt. 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4571.

12. H.R. REP. NO. 1444, *supra* note 11, at 4566.

of criminal punishment for drug violations.[13] Previous legislation in the area of drug abuse prevention and control had been diverse and often duplicative.[14] The Act set out to collect these laws "in one piece of legislation based upon new scientific information . . . and greater information concerning the scope of the problem."[15]

The Act was a full-fledged attack on illegal drug trafficking.[16] Congress recognized that the drug problem was a growing concern that appeared "to be approaching epidemic proportions,"[17] and that was in need of immediate and focused attention. With the Act, Congress provided a structured method of both punishment and rehabilitation in an effort to bring a halt to the rapidly growing problem of drug abuse in this country.[18]

The CCE[19] specifically targeted drug "kingpins," or those persons within a narcotics operation holding a position of management and authority.[20] The Supreme Court has referred to the CCE as a carefully constructed provision of the Act which aims to reach and punish "the 'top brass' in the drug rings, not the lieutenants and foot soldiers."[21] Courts have recognized that Congress used the CCE section of the Act to deter "large-scale profit-making enterprises engaged in the illegal importation, manufacture and distribution of controlled substances."[22]

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13. *Id.* at 4567.

14. *Id.* at 4571. Since 1914, Congress had passed more than 50 pieces of legislation addressing control of narcotics and dangerous drugs. *Id.*

15. *Id.*; *see* 21 U.S.C. § 848(c) (1988).

16. H.R. REP. NO. 1444, *supra* note 11, at 4575.

17. *Id.* at 4572.

18. *Id.* at 4575.

19. The CCE was originally passed as § 408 of the Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (1988)).

20. 21 U.S.C. § 848(c)(2)(A). Section 848(c) states as follows:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
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> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Id.

21. Garrett v. United States, 471 U.S. 773, 781 (1985).

22. *See, e.g.*, United States v. Valenzuela, 596 F.2d 1361, 1367 (9th Cir. 1979).

Violation of the CCE leads to harsh penalties, including a mandatory minimum sentence of twenty years in prison[23] and, under certain conditions, mandatory life imprisonment[24] or the death penalty.[25] In an effort to assure that only professional criminals who filled the rank of drug lord or "kingpin" would be convicted under the CCE, Congress structured the statute to describe a complex statutory crime.[26] Conviction under the CCE requires, first, that the defendant commit a number of predicate narcotics offenses,[27] and, second, that the defendant's criminal acts meet a number of additional conditions.[28]

Section 848(c) outlines the requirements for a CCE violation.[29] While the predicate offense required for CCE prosecution is any drug-related felony within the Act,[30] the accused must have committed that predicate crime as part of a "continuing series" of violations.[31] Furthermore, the defendant must undertake this series of drug-related violations in the position of supervisor or manager of at least five other individuals,[32] while obtaining substantial income or gain therefrom.[33]

The CCE provision was enacted because Congress acknowledged that the drug enforcement laws of the past had been "for the most part, ineffective in halting the increased upsurge of drug abuse

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23. 21 U.S.C. § 848(a) (1988).

24. *Id.* § 848(b).

25. *Id.* § 848(e).

26. Jeffers v. United States, 432 U.S. 137, 146 (1977). The most widely recognized complex statutory crime is RICO, which was enacted, like the CCE, in 1970. *See supra* note 10. The complex statutory crime is relatively modern but has its roots in long-recognized federal crimes. 18 U.S.C. § 1341 (1988) (Mail Fraud Act); 18 U.S.C. § 1952 (1988) (Travel Act).

27. 21 U.S.C. § 848(c)(1).

28. *Id.* § 848(c)(2); *see supra* note 20.

29. *See supra* note 20.

30. *See* 21 U.S.C. § 848(c)(1). The prohibited drug-related acts appear in §§ 841(a), 842(a), and 960(a), and encompass all illegal drug-related activity.

31. *Id.* § 848(c)(2). The circuits disagree as to precisely how many violations constitute a "continuing series" for purposes of the CCE statute. Several circuits recognize a continuing series to be three or more violative acts. United States v. Echeverri, 854 F.2d 638, 642 (3d Cir. 1988); United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984) (stating, in addition, that the predicate violations do not necessarily have to be convictions), *cert. denied*, 470 U.S. 1084 (1985); United States v. Collier, 358 F. Supp. 1351, 1355 (E.D. Mich. 1973), *aff'd per curiam*, 493 F.2d 327 (6th Cir. 1974). Conversely, the Seventh Circuit has interpreted a continuing series to be only two or more acts. United States v. Kramer, 955 F.2d 479, 486-87 (7th Cir. 1992); United States v. Canino, 949 F.2d 928, 946 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992); United States v. Baker, 905 F.2d 1100, 1104 (7th Cir.), *cert. denied*, 498 U.S. 876 (1990).

32. § 848(c)(2)(A); *see supra* note 20.

33. § 848(c)(2)(B); *see supra* note 20.

throughout our United States."[34] Debates prior to the provision's enactment indicate that the statute was not aimed at "the casual drug user and experimenter,"[35] but rather at the "professional criminal."[36] These comments indicate Congress' concern that the statutory language be structured in a manner that would punish only drug "kingpins," and not lesser drug offenders.

While debating the issue, Congress evaluated two different methods of achieving its aim. Originally, the CCE was introduced into the House of Representatives as a "recidivist provision"[37] that provided "special penalties . . . for these special criminals."[38] Under that approach, the jury would only evaluate "evidence concerning the basic crime which has been charged."[39] Under the proposed version, a procedure would be implemented, after conviction and before sentencing, to identify those defendants guilty of running criminal drug enterprises who were worthy of enhanced punishment.[40] However, Congress rejected this recidivist approach, concluding that it would raise due process problems because the defendant would be unaware of what evidence was submitted to the judge during sentencing.[41]

Congress enacted a second method, which embodied an offense approach.[42] This approach defined the CCE crime as a new and separate offense.[43] The government would have to prove all the requirements of the CCE offense at trial, making prior drug violations elements of the CCE charge instead of regarding them as evidence to

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34. 116 CONG. REC. 33,630 (1970). This is consistent with the overall purpose of the Act. *See supra* note 16 and accompanying text.

35. 116 CONG. REC. 33,631 (1970).

36. *Id.* (remarks of Rep. Poff, sponsor of amendment adding §§ 409-410).

37. Garrett v. United States, 471 U.S. 773, 783 (1985) (considering the congressional debate on the two versions of the CCE).

38. 116 CONG. REC. 33,630 (1970) (remarks of Rep. Poff).

39. *Id.*

40. *Garrett*, 471 U.S. at 783. The factors presently listed in subsection two of the CCE would have been presented to the judge prior to sentencing to establish the need for increased punishment of a particular defendant. *See supra* note 20.

41. 116 CONG. REC. 33,631 (1970) (remarks of Rep. Eckhardt). Representative Eckhardt, while criticizing the recidivist approach, stated, "[b]ut we would be making a terrible mistake if, because of its emotional impact, we should throw away due process of law." *Id.* His concern was that the recidivist approach permitted a defendant's sentence to be "enhanced from 5 to 25 years without his knowing what the evidence against him was and what the matter is all about." *Id.* He supported the second approach, which assured that "if you are going to prove a man guilty, you have to come into court and prove every element of the continuing criminal offense." *Id.*

42. *Id.*; *see Garrett*, 471 U.S. at 783.

43. *See* H.R. REP. NO. 1444, *supra* note 11, at 4566.

be weighed at the time of sentencing.[44] Congress hailed this approach as being in line with the "traditional American criminal process,"[45] which requires that the government prove each element of an offense at trial.[46]

The Supreme Court has recognized that the CCE created a separate criminal offense under which Congress intended to allow prosecution for both the predicate offenses and the CCE offense itself.[47] In addition, courts have repeatedly upheld the CCE's harsh penalties in the face of criminal defendants' arguments that the statute is unconstitutional.[48]

Through the CCE statute, Congress has provided a powerful weapon against the serious drug offender. The various elements of the statute[49] seek to assure that a defendant convicted of a CCE offense is an individual who fills the role of drug lord or "kingpin." Those elements, however, give rise to problems of jury concurrence because a general verdict of guilt on the CCE charge does not assure that the jurors agreed, either unanimously, or even by a substantial majority, upon which of the defendant's acts constituted the "continuing series."[50]

B. *Jury Unanimity in Federal Criminal Trials*

The constitutional guarantee of a right to trial by jury is embodied in the Sixth Amendment to the Constitution.[51] The Supreme

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44. 116 CONG. REC. 33,631 (1970) (remarks of Rep. Eckhardt); *see* 21 U.S.C. § 848(c)(1) (1988).

45. 116 CONG. REC. 33,631 (1970) (remarks of Rep. Eckhardt).

46. *Id.*

47. Garrett v. United States, 471 U.S. 773, 786 (1985).

48. United States v. Darby, 744 F.2d 1508, 1529 (11th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) (holding that the CCE does not violate the defendant's due process rights); United States v. Dickey, 736 F.2d 571, 588 n.7 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985) (recognizing that the CCE was not void for vagueness on its face); United States v. Jones, 438 F.2d 461, 467-68 (7th Cir. 1971) (concluding that provisions of the CCE did not unconstitutionally encroach on judicial authority); United States v. Lozaw, 427 F.2d 911, 917 (2d Cir. 1970) (upholding the constitutionality of the CCE's mandated prohibition of probation).

49. *See supra* note 20.

50. 21 U.S.C. § 848(c)(2) (1988); *see supra* note 20.

51. U.S. CONST. amend. VI. That amendment states,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

Court has concluded that this guarantee is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[52] In criminal cases, the Supreme Court has recognized that a trial by jury provides "indispensable protection against the possibility of governmental oppression,"[53] and allows the defendant's guilt or innocence to be determined by a group of lay people whose common-sense judgment stands between the accused and his or her accuser.[54]

In addition to a trial by jury, the defendant in a federal criminal trial has a right to a unanimous jury verdict.[55] While, in the past, courts recognized that the Sixth Amendment was the source of the federal criminal defendant's right to jury unanimity,[56] the United States Supreme Court has recently indicated that the question of juror agreement on factual issues should be interpreted under due process.[57] Although the Court did not reach the unanimity issue, it interpreted the problem of "verdict specificity" under due process.[58] Federal Rule of Criminal Procedure 31(a) requires unanimous jury verdicts for the purpose of protecting a defendant's constitutional rights.[59] Conflicting

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52. Duncan v. Louisiana, 391 U.S. 145, 158 (1968) (recognizing the extension of the right to a trial by jury to state criminal proceedings via the Due Process Clause of the Fourteenth Amendment).

53. Brown v. Louisiana, 447 U.S. 323, 330 (1980).

54. Williams v. Florida, 399 U.S. 78, 100 (1970).

55. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356, 366, 380 (1972) (Powell, J., concurring) (Douglas, J., dissenting); Andres v. United States, 333 U.S. 740 (1948); United States v. Schiff, 801 F.2d 108 (2d Cir. 1986), *cert. denied*, 480 U.S. 945 (1987).

In *Apodaca*, the Court noted four theories of the origin of the unanimity requirement, but did not attempt to define the scope of this right. *Apodaca*, 406 U.S. at 407 n.2. First, the Court recognized that the requirement of juror unanimity might have developed in order to counteract a lack of other rules to ensure the defendant a fair trial. *Id.* Second, the Court noted that the requirement may have arisen from the ancient system of trial by compurgation, which added to the number of compurgators until one party had gained the support of twelve. *Id.* Third, the Court recognized the possibility that the practice of unanimity developed because in medieval times minority jurors would be guilty of criminal perjury. *Id.* Finally, the Court noted the possibility that jury unanimity arose from the concept of consent, which carried with it the idea of unanimity. *Id.*

56. *Johnson*, 406 U.S. at 356; *Andres*, 333 U.S. at 740; *Schiff*, 801 F.2d at 108.

57. Schad v. Arizona, 111 S. Ct. 2491, 2498 n.5. (1991).

58. *Id.* According to the Supreme Court decision, *In re Winship*, 397 U.S. 358 (1970), due process requires that every essential element of a crime must be proved beyond a reasonable doubt. The prosecution must meet that standard of proof for every fact necessary to establish the crime charged. *Id.* at 364; *see infra* note 162 and accompanying text. This case is not, however, of much assistance in determining the *degree* of factual specificity needed to satisfy the reasonable doubt standard.

59. FED. R. CRIM. P. 31(a). The rule states, "[t]he verdict shall be unanimous." *Id.*; *see also* United States v. Essex, 734 F.2d 832 (D.C. Cir. 1984) (holding that the trial court committed plain error by allowing 11 jurors to decide the case when the court did not

decisions in the Seventh and Third Circuits indicate, however, that uncertainty remains over the scope and extent of the unanimity requirement.[60]

Jury unanimity " 'means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense.' "[61] General unanimity occurs when the jurors are in agreement on a general proposition, such as that the defendant is guilty of the charged offense.[62] Specific unanimity, on the other hand, requires that the trial court "augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts."[63]

In the ordinary case, a general unanimity instruction will suffice to protect the defendant's constitutional rights.[64] However, several

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attempt to locate the missing juror, even though the defendant had waived a full 12 person jury).

60. *See* United States v. Canino, 949 F.2d 928 (7th Cir. 1991) (holding that a general unanimity instruction on the "continuing series" element was sufficient), *cert. denied*, 112 S. Ct. 1940 (1992); United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988) (requiring a specific unanimity instruction to assure that each juror specifically agreed upon the precise violations the defendant committed that constituted the "continuing series"); *see infra* notes 83-87 and accompanying text.

61. McKoy v. North Carolina, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring) (quoting United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1983)).

62. *Ferris*, 719 F.2d at 1407 (holding that a general unanimity instruction suffices when presentation of a case involving multiple acts within one count of an indictment is so clear that unanimity can be presumed).

63. United States v. Echeverry, 719 F.2d 974, 975 (9th Cir. 1983).

64. United States v. Hernandez-Escarsega, 886 F.2d 1560, 1572 (9th Cir. 1989) (holding that the district court's general unanimity instruction on the "continuing series" element of a CCE charged offense was harmless upon finding that the jury had unanimously agreed on the three predicate offenses), *cert. denied*, 497 U.S. 1003 (1990); United States v. Anguiano, 873 F.2d 1314, 1321 (9th Cir.) (holding that the district court's failure to give a specific unanimity instruction was not plain error in a conspiracy case where the court found no possibility of juror confusion), *cert. denied*, 493 U.S. 969 (1989); *Ferris*, 719 F.2d at 1407 (holding that, in a case involving possession of controlled substances with intent to distribute, conspiracy to distribute, and drug distribution, the indictment was "sufficiently simple and clear in its presentation" to necessitate only a general unanimity instruction).

In *Hernandez-Escarsega*, for example, the trial court gave a general instruction that in order to convict the defendant, the jury had to find beyond a reasonable doubt that the alleged "offenses were part of three or more offenses committed by the Defendant over a definite period of time in violation of the federal narcotics laws which make it a crime to conspire to import and distribute marijuana." 886 F.2d at 1573. While this instruction stated that the offenses must be violations of the federal narcotics laws, thus satisfying the first part of the CCE, it does not require unanimity as to which offenses were committed. *Id.* In *Ferris*, the trial court's general unanimity instruction "stated simply that the jury's verdict must be unanimous." 719 F.2d at 1407.

circuits have concluded that a specific unanimity instruction is warranted when the criminal statute involved is sufficiently complex.[65] For instance, in *United States v. Anguiano*,[66] the court identified a number of situations that provoked a "genuine possibility of juror confusion,"[67] thus necessitating specific juror unanimity.[68] According to

65. United States v. Jerome, 942 F.2d 1328, 1330 (9th Cir. 1991) (requiring specific unanimity as to the identity of the five persons supervised by the defendant in a CCE case); United States v. Holley, 942 F.2d 916, 929 (5th Cir. 1991) (holding that the district court's failure to give a specific unanimity instruction in a perjury case was reversible error because "there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count"); United States v. Sanchez, 914 F.2d 1355, 1360 (9th Cir. 1990) (concluding that a specific unanimity instruction was not necessary in a case involving the crime of assaulting a federal officer, but recognizing in dicta the need for specific juror unanimity when different jurors may have convicted the defendant based on different facts due to complex evidence, a discrepancy between the evidence and the indictment, or some other factor presenting a substantial possibility of juror confusion), *cert. denied*, 111 S. Ct. 1626 (1991); United States v. North, 910 F.2d 843, 878 (D.C. Cir. 1990) (holding that the defendant, Oliver L. North, who was charged with crimes relating to a congressional investigation, was entitled to a specific unanimity instruction where various permutations would have supported a valid conviction, presenting a real and significant possibility of juror confusion), *cert. denied*, 111 S. Ct. 2235 (1991); United States v. Mobile Materials, Inc., 881 F.2d 866, 874-75 (10th Cir. 1989) (recognizing the appropriateness of the district court's specific jury instruction which required the jury to find the single, continuing conspiracy charged in the indictment), *cert. denied*, 493 U.S. 1043 (1990); United States v. Duncan, 850 F.2d 1104, 1114 (6th Cir. 1988) (concluding that where a single count charged two separate false statements, the jury must have been unanimous as to at least one specific statement), *cert. denied*, 493 U.S. 1025 (1990); United States v. Gilley, 836 F.2d 1206, 1211-13 (9th Cir.) (acknowledging the sufficiency of a general unanimity instruction in the usual case, but holding that a specific unanimity instruction should have been given where the charge of conducting an illegal gambling business raised the possibility of less than unanimous juror agreement on the period in which five individuals were continually involved), *cert. denied*, 109 S. Ct. 219 (1988); United States v. Beros, 833 F.2d 455, 460 (3d Cir. 1987) (concluding that the trial court should have instructed the jury that they must reach unanimous agreement regarding which of the defendant's acts constituted each element of the charged offense); United States v. Ryan, 828 F.2d 1010, 1020 (3d Cir. 1987) (holding that when a count will be submitted to the court on alternative theories, prudence counsels the trial court to give an augmented instruction if requested); United States v. Payseno, 782 F.2d 832, 837 (9th Cir. 1986) (recognizing the necessity for specific unanimity in a case where the defendant's acts of extortion were directed at separate victims, occurred at different times and places, involved different approaches of relying on threats, and were committed by fluctuating numbers of individuals); *Echeverry*, 719 F.2d at 975 (finding the district court's general unanimity instruction on the defendant's drug conspiracy and distribution charges ambiguous, and reversing the defendant's conviction on those charges).

66. 873 F.2d 1314 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989).

67. *Id.* at 1319.

68. *Id.* First, the court held that a specific unanimity instruction is required in conspiracy cases where the jury indicates that it is confused about the nature of the charge. *Id.*; *see also* United States v. Gordon, 844 F.2d 1397, 1401-02 (9th Cir. 1988); United States v. Gilley, 836 F.2d 1206, 1212 (9th Cir.), *cert. denied*, 109 S. Ct. 219 (1988); *Echeverry*, 719 F.2d at 975 (stating that the jury's questions indicated their confusion regarding multiple conspiracies and that such inquiry should have alerted the trial judge to the likelihood of a non-unanimous verdict). Second, the court noted that a specific unanimity instruction

the United States Court of Appeals for the Ninth Circuit, "[w]hen 'there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts,' "[69] the trial court is obligated to ensure that the jury " 'understands its duty to unanimously agree to a particular set of facts.' "[70]

Generally, the unanimous verdict rule "requires jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged."[71] This requirement ordinarily extends to all issues left for resolution by the jury.[72] It is not clear whether the jurors in a CCE trial must specifically agree on which of the defendant's drug violations constitute the "continuing series" under the statute.[73]

II. CONFLICTING CASE LAW ON JURY UNANIMITY IN CCE CASES

The CCE statute requires that the defendant commit a drug-related felony[74] that is "part of a continuing series of violations"[75] "undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of . . . management."[76] Thus, the CCE statute contains two parts.[77] First, the de-

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might be necessary when the indictment was sufficiently factually complex to indicate the possibility of jury confusion. *Anguiano*, 873 F.2d at 1320; *see also Gilley*, 836 F.2d at 1211-12. Third, the Ninth Circuit indicated that cases in which the jury is likely to be confused because the indictment is particularly broad and ambiguous would necessitate a specific unanimity instruction. *Anguiano*, 873 F.2d at 1319; *see, e.g.*, *Gordon*, 844 F.2d at 1401 (concluding that the first count of the indictment, charging the defendant with two different acts of conspiracy, presented a distinct possibility of jury confusion as to upon which of the defendant's acts the jury had unanimously agreed).

69. United States v. Powell, 932 F.2d 1337, 1341 (9th Cir.), *cert. denied*, 112 S. Ct. 256 (1991) (quoting United States v. Payseno, 782 F.2d 832, 836 (9th Cir. 1986)).

70. *Payseno*, 782 F.2d at 836 (quoting *Echeverry*, 719 F.2d at 975).

71. United States v. Gipson, 553 F.2d 453, 457-58 (5th Cir. 1977).

72. Andres v. United States, 333 U.S. 740, 748 (1948).

73. *See infra* notes 83-87 and accompanying text.

74. 21 U.S.C. § 848(c)(1) (1988); *see supra* note 30.

75. § 848(c)(2); *see supra* note 20.

76. § 848(c)(2)(A); *see supra* note 20. The statute goes on to require that the defendant obtain substantial income from the aforementioned violative activity. § 848(c)(2)(B).

77. The CCE does not expressly state that the "continuing series" and "five or more underlings" provisions are indeed *elements* of the crime. The legislative history of the statute, however, indicates that the "continuing series" provision was indeed meant as an *element*. *See supra* notes 37-46 and accompanying text. As the Supreme Court noted, the version of the CCE that was adopted "made engagement in a continuing criminal enterprise a new and distinct offense with all its *elements* triable in court." Garrett v. United States, 471 U.S. 773, 783 (1985) (emphasis added). The courts seem to treat the "five or

fendant must commit a "continuing series" of violations.[78] Second, the defendant must supervise or manage five or more underlings.[79]

Jury unanimity is not expressly addressed or required in any part of the CCE. As for the five or more underlings provision, all but one of the courts of appeals that have considered the issue have concluded that the Constitution does not require the jury to agree on the specific identities of the five or more individuals that the defendant managed or supervised.[80] Furthermore, the courts do not require that the defendant's supervisory actions occur simultaneously with all of the five or more underlings.[81] The supervision prong of the statute is satisfied, therefore, even when the prosecution can only establish the defendant's supervision of five or more different co-conspirators at various times during the enterprise.[82]

Conversely, the "continuing series" element of the CCE statute has given rise to a conflict among the circuits regarding the appropriateness of specific versus general juror unanimity. In *United States v. Echeverri*,[83] the United States Court of Appeals for the Third Circuit concluded that the jury must unanimously agree as to which of the

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more underlings" requirement as "peripheral" to the CCE's purpose and do not require unanimity as to that part of the statute. *See infra* note 80. This Note does not take a position on the validity of that view of the "five or more underlings" requirement. The "continuing series" provision, on the other hand, addresses the substantive predicate acts that the defendant must commit to be found guilty of a CCE charge and is, no doubt, the part of the statute to which the Court referred in *Garrett* when it spoke of the *elements* of the CCE offense. *Garrett*, 471 U.S. at 783.

78. 21 U.S.C. § 848(c)(2); *see supra* note 20.

79. § 848(c)(2)(A); *see supra* note 20.

80. United States v. Harris, 959 F.2d 246, 254 (D.C. Cir. 1992) (not requiring specific unanimity); *see also* United States v. Moorman, 944 F.2d 801, 803 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1766 (1992); United States v. English, 925 F.2d 154, 159 (6th Cir.), *cert. denied*, 111 S. Ct. 2812 (1991); United States v. Linn, 889 F.2d 1369, 1374 (5th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990); United States v. Tarvers, 833 F.2d 1068, 1075 (1st Cir. 1987); United States v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). *But see* United States v. Jerome, 942 F.2d 1328 (9th Cir. 1991) (requiring specific unanimity, reasoning that the number of persons involved presented a genuine possibility of juror confusion).

81. United States v. Bafia, 949 F.2d 1465, 1470-71 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1989 (1992); United States v. Jenkins, 904 F.2d 549, 553-54 (10th Cir.), *cert. denied*, 498 U.S. 962 (1990); United States v. Ricks, 882 F.2d 885, 891 (4th Cir. 1989); United States v. Fernandez, 822 F.2d 382, 386 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987); United States v. Boldin, 818 F.2d 771, 775-76 (11th Cir. 1987); United States v. Lueth, 807 F.2d 719, 731 (8th Cir. 1986); United States v. Burt, 765 F.2d 1364, 1366 (9th Cir. 1985); United States v. Young, 745 F.2d 733, 747 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); United States v. Phillips, 664 F.2d 971, 1034 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

82. *Bafia*, 949 F.2d at 1471.

83. 854 F.2d 638 (3d Cir. 1988).

defendant's particular violations constituted the "continuing series" under the CCE.[84]

The United States Court of Appeals for the Seventh Circuit reached a contrary decision on similar facts in *United States v. Canino*.[85] In that case, the court held that the jury was not required to reach unanimity as to the specific acts constituting the "continuing series."[86] According to the *Canino* majority, the constitutional requirement of juror unanimity in federal criminal trials is satisfied in a CCE case when each juror finds beyond a reasonable doubt that the defendant committed a "continuing series" of violations under the CCE statute.[87]

A. United States v. Echeverri[88]

In *Echeverri*, the defendant, Elkin Echeverri, was convicted on five drug-related charges after a trial involving seven other defendants.[89] Echeverri was accused and convicted of operating a continuing criminal enterprise between January 1977 and August 1984.[90] At trial, the prosecution relied primarily on the testimony of four unindicted co-conspirators.[91] Despite Echeverri's testimony, in which he maintained his innocence, the jury convicted him on all five counts,

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84. *Id.* at 643.

85. 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

86. *Id.* at 947-48; *see also* United States v. Kramer, 955 F.2d 479 (7th Cir. 1992). In *Kramer*, the court briefly addressed the defendant's jury unanimity argument. *Kramer*, 955 F.2d at 486-87. The defendant claimed that the jury must be instructed to agree upon the precise acts they relied on to find a CCE "continuing series." The court simply followed *Canino* in finding the trial court's general unanimity instruction sufficient and the defendant's unanimity argument unavailing. *Id.*

87. *Canino*, 949 F.2d at 947-48.

88. 854 F.2d 638 (3d Cir. 1988).

89. *Id.* at 639. The jury convicted all but one of the defendants on one or more of the five counts. Echeverri was convicted of all five counts: (1) a RICO conspiracy, (2) a substantive RICO offense, (3) operation of a continuing criminal enterprise, (4) a drug-related conspiracy in violation of 21 U.S.C. § 846, and (5) possession of cocaine with intent to distribute. *Id.* at 641. Defendant Susan Commorato was acquitted of the only charge for which she was tried. *Id.* at 641 n.2.

In 1969, Echeverri emigrated from Columbia to the United States and by 1977 had established a drug distribution operation out of his apartment where he lived with his brother in Elizabethtown, New Jersey. *Id.* at 640. Echeverri's drug business operated in five states—New Jersey, California, Florida, Texas, and Colorado—and involved several other individuals as conduits, distributors, and couriers. *Id.* The operation flourished until 1982, when Echeverri's brother was murdered in New York. *Id.* The murder led to a police investigation of the Echeverri apartment, which revealed drugs, drug paraphernalia, $45,000 in cash, and notebooks containing drug distribution records. *Id.*

90. *Id.* at 641.

91. *Id.* at 640. The four individuals who testified were unindicted co-conspirators who had been given immunity or other benefits for their testimony. *Id.*

including a CCE violation.[92]

On appeal, Echeverri raised several objections.[93] Of particular importance, he alleged that the trial judge erroneously gave the jury only a general unanimity instruction on the "continuing series" element of the CCE statute.[94] The prosecution alleged that the defendant had committed several different drug transactions.[95] Echeverri maintained that conviction under the CCE required specific jury unanimity upon precisely which of those transactions the jury relied in finding a "continuing series."[96] As a result, Echeverri contended that the trial court's refusal to give his requested instruction amounted to reversible error.[97]

The Court of Appeals for the Third Circuit agreed with Echeverri and reversed his conviction.[98] The court reasoned "that a significant potential for jury confusion" on the CCE count existed to warrant more than the general unanimity instruction given by the trial court.[99] The Third Circuit's holding was primarily based on its prior holding in *United States v. Beros*.[100]

In *Beros*, a union officer was convicted of violating two federal statutes that prohibited the wilful misuse of union funds[101] and employee welfare benefit plan funds.[102] The defendant was also convicted

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92. *See supra* note 89.

93. *Echeverri*, 854 F.2d at 639. Echeverri alleged that his convictions could not stand because (1) the district court refused to give his requested jury instruction which addressed the need for unanimous agreement on the specific acts the jury found the defendant to have committed which established a "continuing series of violations" under the CCE, (2) on two occasions the district court admitted certain evidence of other, uncharged criminal conduct, in error, and (3) the predicate acts that the jury found under RICO did not establish a "pattern" under that statute. *Id.*

94. *Id.*

95. *Id.* at 640-41.

96. *Id.* at 642.

97. *Id.* Echeverri had requested that the trial judge give the jury the following instruction:

> The second element the government must prove beyond a reasonable doubt is that this offense was part of a continuing series of violations of the federal narcotics laws. A continuing series of violations is three or more violations of the federal narcotics laws committed over a definite period of time.
>
> You must unanimously agree on which three acts constitute the continuing series of violations.

Id. See *supra* note 31 for a discussion of the conflict that exists among the circuits as to whether a "continuing series" requires two or three narcotics violations.

98. *Id.* at 643.

99. *Id.*

100. 833 F.2d 455 (3d Cir. 1987); *see Echeverri*, 854 F.2d at 642.

101. 29 U.S.C. § 501(c) (1988).

102. 18 U.S.C. § 664 (1988).

of conspiring with another individual to commit these offenses.[103] At trial, the judge refused to instruct the jurors that they must reach unanimous agreement with respect to which of the defendant's acts constituted each element of the crime charged. The Third Circuit concluded that this refusal was erroneous.[104]

The *Echeverri* court analogized the facts before it to the circumstances in *Beros*.[105] Although the *Beros* case did not involve the CCE statute, it did involve two complex crimes that required a number of underlying predicate acts to constitute the charged offense.[106] The *Echeverri* court reasoned that the comparable complexity of these statutes was sufficient to make the two cases "indistinguishable."[107]

The court concluded that, due to the spectrum of choices by which the jury could have come to its verdict and the possibility that jurors could have disagreed as to precisely which of the defendant's acts supported a conviction, a sufficiently strong potential for jury misunderstanding and confusion existed to necessitate a specific unanimity instruction.[108] This decision was primarily based upon the theory that the complexity of the crime determines the need for a specific unanimity instruction.[109]

The courts in both *Echeverri* and *Beros* premised their reasoning on *United States v. Gipson*.[110] In *Gipson*, the defendant was charged with violating a federal statute that prohibited receiving, concealing, storing, bartering, selling, or disposing of stolen vehicles moving in interstate commerce.[111] The *Gipson* court found that violation of this statute could arise from one of several specific acts and, therefore,

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103. *Beros*, 833 F.2d at 457.

104. *Id.* at 458. The appellate court in *Beros* reasoned that "the range of possibilities by which the jury could have reached its verdict, and the possibility that individual jurors reasonably could have disagreed as to which act supported the guilt," necessitated the use of a clear unanimity instruction. *Id.*

105. United States v. Echeverri, 854 F.2d 638, 642-43 (3d Cir. 1988).

106. Both statutes at issue in *Beros* required embezzling, stealing, abstracting, and converting certain funds to one's own use for violation of the specified offense. *Beros*, 833 F.2d at 459; *see also* 29 U.S.C. § 501(c) (1988); 18 U.S.C. § 664 (1988).

107. *Echeverri*, 854 F.2d at 643.

108. *Id.* at 642-43.

109. *Id.* See *supra* note 65 and accompanying text for a discussion of this approach as it has been applied to a number of complex statutes.

The *Echeverri* opinion also referred to the trial court's treatment of the defendant's RICO charge and indicated that the specific instruction that was given with respect to the RICO charge should have also been given on the CCE charge. *Id.* at 643. See *infra* note 264 for a discussion of the court's suggestion.

110. 553 F.2d 453 (5th Cir. 1977).

111. *Id.* at 455; *see* National Motor Vehicle Theft Act, Pub. L. No. 99-508, § 101(1)(1)(a), 62 Stat. 806 (1948) (codified as amended at 18 U.S.C. § 2313 (1988)).

presented a jury unanimity problem.[112] The court reasoned that, in order to assure unanimity, the jury was required to substantially agree on exactly what acts the defendant had committed before he could be convicted.[113] As a result, the Fifth Circuit concluded that when there is a potential for jury confusion or a less than unanimous verdict due to the presence of a single, criminal statute that prohibits a number of acts, the defendant's constitutional right to a unanimous jury verdict would not be preserved by the jury's simple consensus on guilt "unless [a] prerequisite of jury consensus as to the defendant's course of action is also required."[114]

The Third Circuit in *Echeverri* reasoned that the *Gipson* rationale was applicable in a case involving the CCE.[115] Because the district court's jury instruction merely informed the jury that the term "continuing series" meant three or more drug-related offenses, it failed to assure unanimous juror agreement that the defendant committed the same three violations.[116] Consequently, the *Echeverri* court found these circumstances and the CCE statute to be sufficiently confusing to the jury to warrant more than the district court's general unanimity instruction.[117]

B. United States v. Canino[118]

In *Canino*, the defendant, Michael J. Canino, was convicted of a marijuana distribution conspiracy and of engaging in a continuing criminal enterprise.[119] The grand jury indictment specified five transactions, from 1982 until 1986,[120] in which Canino headed an organization that accepted drug shipments for storage and sale[121] in violation

112. *Gipson*, 553 F.2d at 456-57.

113. *Id.* at 457-58.

114. *Id.* at 458.

115. United States v. Echeverri, 854 F.2d 638, 643 (3d Cir. 1988).

116. *Id.* Some courts recognize that two, rather than three, violations establish a continuing series. *See supra* note 31.

117. *Echeverri*, 854 F.2d at 643.

118. 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

119. *Id.* at 932. The remaining defendants were convicted of conspiracy to distribute in excess of 1000 pounds of marijuana. *Id.* Canino and his fellow defendants were involved in the notorious "Randy Lanier-Benjamin Kramer" drug operation, which was responsible for importing over 600,000 pounds of marijuana into the United States over a period of ten years. *Id.* at 933.

120. In 1986, a barge load of marijuana that was shipped to San Francisco, California en route to Pennsylvania was interdicted by the Federal Bureau of Investigation. *Id.* at 934.

121. *Id.* at 933. Canino had originally acted as a mere purchaser from the Lanier organization. Beginning in 1982, however, he increased his participation and eventually became a major player in the Lanier drug ring. *Id.* at 933-34.

of the federal drug conspiracy laws.[122]

Canino raised an objection to the lower court's general unanimity instruction with respect to the "continuing series" element of the CCE count.[123] Canino argued that the jury should have been instructed that they must unanimously agree upon which of the drug offenses offered into evidence by the government established the continuing series necessary for CCE conviction.[124] His argument was primarily based upon the holding in *Echeverri* and Federal Rule of Criminal Procedure 31(a).[125]

The *Canino* court noted that the Third Circuit in *Echeverri* found reversible error in the district court's failure to charge the jury that it must unanimously agree as to which of the defendant's acts constituted a "continuing series of violations" under the CCE.[126] After a brief reference to the Sixth Amendment requirement of a unanimous jury verdict,[127] the *Canino* majority discussed the basis of the *Echeverri* court's reasoning and concluded that the CCE was quite different from the criminal statutes which the *Echeverri* court had analogized to the CCE.[128]

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122. *Id.*

123. *Id.* at 945-46. The trial court gave the following jury instruction:

> Thus, you must find beyond a reasonable doubt that the defendant is guilty of conspiracy to distribute more than 1,000 pounds of marijuana as charged in Count II *and/or* that he is guilty of knowingly and intentionally distributing marijuana or possessing with intent to distribute marijuana as set forth in paragraphs A through E of Count I of the indictment *or* he is guilty of knowingly and intentionally distributing or possessing with intent to distribute marijuana from a Jamaica Load in 1984, and that this conduct, together with any additional violations of the federal drug laws constituted a total of three or more violations of the federal drug laws committed over the period of time charged in Count I with a single or similar purpose. This will constitute a finding that the defendant engaged in a continuing series of violations.

Id. at 944 (emphasis added).

124. *Id.* at 945-46.

125. FED. R. CRIM. P. 31(a); *see supra* note 59 and accompanying text.

126. United States v. Canino, 949 F.2d 928, 946 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992); *see supra* note 84 and accompanying text. The *Canino* majority briefly acknowledged, in a footnote, the Sixth Amendment requirement of a unanimous jury verdict, set out in Federal Rule of Criminal Procedure 31(a). *Canino*, 949 F.2d at 946 n.5.

127. *Canino*, 949 F.2d at 946 n.5. Prior to the *Canino* decision, the Supreme Court had characterized the criminal defendant's right to jury unanimity as a due process right. Schad v. Arizona, 111 S. Ct. 2491 (1991). Thus, it is not clear why the *Canino* court interpreted that right under the Sixth Amendment.

128. *Canino*, 949 F.2d at 946 n.6. See *supra* notes 101-02, 111 and accompanying text for reference to the criminal statutes the *Echeverri* court compared to the CCE.

The *Echeverri* court had relied on the reasoning in United States v. Beros, 833 F.2d 455 (3d Cir. 1987). United States v. Echeverri, 854 F.2d 638, 642-43 (3d Cir. 1988). The *Beros* court relied on United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), as support for

The *Canino* court also noted that, in *United States v. Gipson*,[129] the Court of Appeals for the Fifth Circuit required specific unanimity because it concluded that the acts listed in the statute at issue[130] were so diverse that, absent a specific unanimity instruction, it would be uncertain whether the jury found the defendant guilty of one class of offense or another.[131] The *Canino* court distinguished *Gipson* by reasoning that the dichotomy created by the statute in *Gipson* was not present in the CCE.[132] The court then went on to conclude that the "expansive breadth of culpable offenses suitable for CCE treatment"[133] diminished the need to determine precisely which acts each juror attributed to the defendant.[134] Therefore, the court found that the proper focus of the CCE analysis should be on the frequency of the defendant's participation in conspiratorial drug offenses, "rather than any particularization of the acts used to demonstrate 'continuous.' "[135]

The *Canino* court also rejected the defendant's argument concerning the significance of the *Echeverri* [136] case and referred to *United States v. Jackson*.[137] In *Jackson*, the United States Court of Appeals for the Third Circuit held that the specific unanimity it had required in *Echeverri*,[138] with respect to the "continuing series" element of the CCE, did not apply to the part of the statute that required the CCE defendant to supervise five or more underlings.[139] The *Jackson* court reasoned that while the "continuing series" element focused on the conduct that the CCE sought to punish, the identity of the five or more underlings was only "peripheral" to the statute's other concern,

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the conclusion that jury unanimity was required regarding the predicate acts of the CCE charge. *Beros*, 833 F.2d at 460.

129. 553 F.2d 453 (5th Cir. 1977).

130. The statute at issue in *Gipson* prohibited receiving, concealing, storing, bartering, selling, or disposing of stolen cars. *See supra* note 111 and accompanying text.

131. *Canino*, 949 F.2d at 946 n.6; *see Gipson*, 553 F.2d at 458.

132. *Canino*, 949 F.2d at 946 n.6.

133. *Id.* But see *infra* note 146 and accompanying text for a discussion of Congress' intent in enacting the CCE, which arguably limits the CCE's breadth by covering only those individuals holding superior positions in the drug ring hierarchies.

134. *Id.*

135. *Id.* at 948 n.7. The *Canino* court was concerned that the danger in carrying the jury unanimity requirement too far would be to require unanimity on specific details that are really more particularized than the statutory language intends. *Id. See also* Hayden J. Trubitt, *Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues*, 36 OKLA. L. REV. 473, 550 (1983).

136. United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988).

137. 879 F.2d 85 (3d Cir. 1989); *see Canino*, 949 F.2d at 946.

138. *See supra* text accompanying note 84.

139. *Jackson*, 879 F.2d at 88-89. The court did not require specific unanimity as to the identity of the five or more underlings. *Id.*

that the defendant exercise a certain level of control over a sizeable operation.[140] In other words, the *Jackson* court had determined that the specific identity of the five or more underlings was only "peripheral" to the concern that the defendant actually fill the rank of drug "kingpin."[141] The *Canino* court stated that *Jackson* thus represented a "cautious departure" from the Third Circuit's previous decision in *Echeverri*.[142]

However, the *Canino* court went on to disagree with the *Jackson* rationale, finding no basis for distinguishing between the "continuing series" and "five or more underlings" elements for purposes of juror unanimity.[143] The United States Court of Appeals for the Seventh Circuit concluded that the reasoning in two of its own opinions,[144] which recognized the sufficiency of a general unanimity instruction for the "five or more underlings" requirement, should also apply, by analogy, to the CCE's "continuing series" element.[145] As support for this conclusion, the court identified the purpose of the CCE statute as punishing and deterring large and profitable drug operations.[146] Therefore, the *Canino* court reasoned that requiring specific unanimity on the defendant's "continuing series" of predicate acts would run counter to the CCE's general purpose of deterring large-scale drug rings.[147] The court feared that the particularization involved with requiring specific unanimity might result in unjustified acquittals.[148]

The *Canino* court analogized the "five or more underlings" element, and the lack of specificity required thereunder, with the "contin-

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140. *Id.*

141. *Id.*

142. United States v. Canino, 949 F.2d 928, 946-47 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

143. *Id.* at 947.

144. United States v. Bond, 847 F.2d 1233 (7th Cir. 1988); United States v. Markowski, 772 F.2d 358 (7th Cir. 1985).

145. *Canino*, 949 F.2d at 947.

146. *Id.* The court relied on United States v. Valenzuela, 596 F.2d 1361, 1367 (9th Cir. 1979), for its articulation of the purpose of the CCE. *Canino*, 949 F.2d at 947.

However, the *Canino* court's analysis failed to address the fact that the CCE is limited in scope because it seeks to punish only drug "kingpins." The court instead focused only upon the "expansive breadth" of the predicate offenses that fall within the ambit of the CCE. *Id.* at 946 n.6; *see supra* note 30.

During congressional debate over the CCE, Representative Taft referred to the CCE's "purview." 116 CONG. REC. 33,630-31 (1970). This reference acknowledged that the statute was created for the limited purpose of punishing the "kingpins" of the drug ring hierarchies and not their "lieutenants and foot soldiers." *See* Garrett v. United States, 471 U.S. 773, 781 (1985) (discussing the legislative history of the CCE); *see supra* note 21 and accompanying text.

147. *Canino*, 949 F.2d at 947.

148. *Id.* at 947-48.

uing series" element, and reasoned that there should be consistency in the way the CCE is applied.[149] The court noted that the purpose of the CCE is to punish a defendant whom the jury finds to have participated in a connected series of narcotics activities with sufficient frequency.[150] As a result, the court concluded that, in a CCE case, the purpose of the statute is fulfilled when each member of the jury finds beyond a reasonable doubt that a defendant committed at least two predicate acts.[151] The jury need not specifically agree upon which two violations the defendant committed.[152]

Juror divergence on the underlying predicate acts that constitute a "continuing series" under the CCE raises a question of how far the jury must go in agreeing upon particular facts. Although the *Canino* and *Echeverri* courts characterized the question in terms of unanimity under the Sixth Amendment, the Supreme Court has interpreted the problem of juror divergence on certain factual issues under the requirements of due process.[153] An analysis of due process, therefore, will be helpful in resolving the problem of juror non-concurrence and how it should be treated with respect to the CCE.

III. ANALYSIS

In federal criminal trials, a defendant's constitutional right to a unanimous jury verdict is well established.[154] In a CCE case, this

149. *Id.* The court declined "to adopt a chaotic rule which requires the jury to make a unanimous finding with respect to some factual issues (predicate acts) and be relieved of such a requirement in relation to findings of other factual issues ('five or more other persons')." *Id.* at 948.

150. *Id.*

151. *Id.* See *supra* note 31 for a discussion of the split among the circuits as to whether a continuing series is established by the commission of two or three predicate acts.

152. *Id.* at 946.

153. Schad v. Arizona, 111 S. Ct. 2491 (1991); *see supra* notes 57-58 and accompanying text.

The Court of Appeals for the Fifth Circuit in United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), highlighted the existence of a constitutional problem when a court allows juror divergence on the factual elements of a crime. The court was the first circuit court to reverse a conviction based on the likelihood of juror disparity on the underlying factual elements constituting the crime. *Id.* at 459. The Fifth Circuit concluded that the trial court's instruction, which permitted jurors to convict without reaching agreement as to what crime had occurred, was in violation of the defendant's Sixth Amendment right to a jury trial and his procedural right to a unanimous verdict under Federal Rule of Criminal Procedure 31(a). *Id.* at 456. The *Gipson* decision triggered a number of criminal appeals, two of which are represented by United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988), and United States v. Canino, 949 F.2d 928 (7th Cir. 1991). As is evidenced by the conflicting holdings of these two cases, the issue of factual juror concurrence remains controversial. The *Gipson* court did not provide much guidance in resolving the problem.

154. *See supra* note 55.

right is satisfied when all of the jurors agree that the defendant operated a continuing criminal enterprise. Beneath this general verdict of guilt, however, lies a question regarding whether the jury must also agree upon the *factual components* or predicate acts that gave rise to such a verdict. The Supreme Court has recognized that jurors may convict a defendant without coming to a unanimous agreement on the specific mitigating circumstances surrounding the defendant's acts.[155] However, the Court does require some juror specificity regarding the defendant's conduct.[156] A significant area of constitutional inquiry exists between these two vague borders.[157] The problem of juror agreement on predicate acts of the "continuing series" element of the CCE is a small piece of an expansive constitutional problem that was not addressed by either the *Echeverri*[158] court or the *Canino*[159] court.

Neither *Echeverri* nor *Canino* characterized the juror divergence problem as one of due process, as the Supreme Court required in *Schad v. Arizona*. *Echeverri* was decided well before *Schad*, but *Canino* was decided shortly afterwards. Despite this timing, *Canino* identified the question of juror agreement on the CCE predicate acts as one of Sixth Amendment unanimity and did not recognize the due process concern.[160] Nevertheless, after *Schad*, the question of juror agreement or divergence on the underlying factual elements of a crime

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155. *See, e.g.*, McKoy v. North Carolina, 494 U.S. 433 (1990). The defendant was convicted of first-degree murder and the Court held that North Carolina's unanimity requirement impermissibly limited the jurors consideration of mitigating evidence to reverse the defendant's conviction and death sentence. *Id.* at 435. In his concurring opinion, Justice Blackmun commented that different jurors might come to the same bottom-line conclusion on the basis of different pieces of evidence. *Id.* at 449 (Blackmun, J., concurring). He stated that "[p]lainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Id.*

156. *See, e.g.*, *Schad*, 111 S. Ct. at 2497-98 (1991). The plurality opinion in *Schad* recognized that the jury must reach agreement that the defendant committed a particular crime. The Court indicated that, "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.*

157. See Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1 (1993), for a thorough discussion of this constitutional problem.

158. United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988).

159. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

160. *Id.* at 946 n.5. The only indication of any concern over the requirements of due process in the *Canino* opinion occurred in the court's concluding remarks on the issue of juror unanimity when it stated that "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when each juror in a CCE trial is convinced beyond a *reasonable doubt* that a defendant charged under the CCE statute committed two predicate offenses." *Id.* at 948 (emphasis added). The court failed to discuss, however, whether such

must be resolved in terms of a due process analysis.[161]

A. *Due Process Background*

It has long been assumed that proof beyond a reasonable doubt on a criminal charge is constitutionally required for conviction.[162] The Supreme Court, in *In re Winship*,[163] stated that the requirement of proof beyond a reasonable doubt is "basic in our law and rightly one of the boasts of a free society . . . and a safeguard of due process of law in the historic, procedural content of 'due process.' "[164] The reasonable doubt standard is a vital tool in reducing the risk of convictions based on factual error.[165] It provides a material foundation for the presumption of innocence, which lies at the heart of our criminal justice system.[166]

In his opinion for the *Winship* Court, Justice Brennan advocated giving the accused the outcome advantage.[167] To accomplish this end,

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a reasonable doubt is raised when jurors disagree on the factual basis constituting a "continuing series" under the statute.

The reasonable doubt language in the *Canino* opinion is likely to arise from the fact that the unanimity required by the Sixth Amendment serves to effectuate the reasonable doubt standard. *See* Note, *Right to Jury Unanimity on Material Fact Issues:* United States v. Gipson, 91 HARV. L. REV. 499, 501 (1977) (discussing the *Gipson* decision and agreeing with the court's holding that the Sixth Amendment requires conviction by a jury in a federal case to be based upon juror agreement on a specific act along with a general consensus on the defendant's guilt) [hereinafter Note, *Right to Jury Unanimity*].

161. The relevant language of the Fifth Amendment states as follows: "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

While the first place of inquiry would normally be with the statute itself, the language of the CCE provides no guidance regarding the extent to which a jury must agree upon the factual predicate act requirements of the "continuing series" element. In addition, the legislative history provides no direction on the issue. *See supra* note 146. Consequently, one must turn to the Constitution to resolve the problem regarding upon what a jury is required to agree in federal criminal trials.

162. *In re* Winship, 397 U.S. 358, 362 (1970).

163. 397 U.S. 358 (1970).

164. *Id.* at 362 (quoting Leland v. Oregon, 343 U.S. 790, 802-03 (1952) (Frankfurter, J., dissenting)).

165. *Winship*, 397 U.S. at 363.

166. *Id.* at 363.

167. *Id.* The opinion noted,

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

Id. at 364 (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

the burden of proof is allocated to the prosecutor in cases where the accused has something of transcending value at stake.[168] The concept of due process has at its foundation a concern for protection of the innocent from wrongful condemnation.[169] Justice Harlan, in his concurring opinion in *Winship*, noted that in a criminal case, the due process requirement of proof beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[170]

The constitutional mandate of the "proof beyond a reasonable doubt" standard in criminal cases[171] reveals the Court's recognition of the necessity of factual concurrence among convicting jurors. The Court stated that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged."[172] The Court did not comment, however, on the level of factual specificity that convicting jurors must reach.[173]

1. Facts that Require Juror Agreement

In an attempt to define a line of demarcation between factual issues upon which a jury must agree and those upon which a jury need not agree, the courts use a standard of materiality.[174] The dividing line between "material" fact issues, on which the jury must reach agreement, and more specific "immaterial" issues, is not always clear.[175]

The courts have suggested different methods of determining when a factual issue is sufficiently material to require specific juror agreement.[176] Most courts hold that a viable jury non-concurrence claim

168. *Id.* at 363.

169. *Id.* at 374 (Harlan, J., concurring).

170. *Id.* at 372.

171. *Id.* at 362.

172. *Id.* at 364 (emphasis added).

173. Although the *Winship* Court did not clearly articulate which cases require juror agreement on the factual issues underlying a given offense, one commentator has suggested a factual concurrence mandate which would restrict divergence among convicting jurors as a safeguard against erroneous convictions. Howe, *supra* note 157, at 7-16. Professor Howe suggests that in situations where there is a potential for jurors to disagree over the factual basis for a guilty verdict, "jurors ought to be required to agree upon at least one of the factual alternatives before finding the defendant guilty." *Id.* at 82.

174. United States v. Gipson, 553 F.2d 453 (5th Cir. 1977); United States v. Lennon, 246 F.2d 24, 27 (2d Cir.), *cert. denied*, 355 U.S. 836 (1957) (recognizing the physical filing of a false tax return as the most specific material "act" upon which the jury was required to unanimously agree); *see also* Note, *Right to Jury Unanimity*, *supra* note 160, at 501.

175. *See* Note, *Right to Jury Unanimity*, *supra* note 160, at 501.

176. *See* Howe, *supra* note 157, at 21-47. Professor Howe's article analyzed the

only arises when a single criminal charge involves two or more distinct and separate crimes.[177] Thus, a convicted defendant may only appeal based on a claim that the jury's verdict was defective because of non-concurrence when the indictment had alleged two or more distinct criminal acts. In this respect, the CCE would give rise to a viable juror divergence claim because the statute requires commission of at least two[178] drug-related *felonies* to constitute the "continuing series" element of a CCE offense.[179] Thus, under the distinct-crimes standard, the jury in a CCE case should not be permitted to arrive at a general verdict of guilt or innocence when they disagree as to which of the defendant's acts constituted a "continuing series" under the statute.

Some courts, however, frequently employ the distinct-crimes standard to reject factual divergence claims.[180] These courts reason

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judicial approaches to materiality, criticized them, and provided a resolution based on "careful analysis of the evidentiary context in each case." *Id.* at 42, 46. This more sensible approach to determining which facts require jury agreement is to proceed on a case-by-case basis, focusing on the avoidance of juror confusion. In fact, the Ninth Circuit has recently identified a number of situations that might necessitate specific juror unanimity. Jeffries v. Blodgett, 974 F.2d 1179, 1192 (9th Cir. 1992) (addressing a Washington aggravated first-degree murder statute and concluding that the jury was not required to specify mitigating factors and the corresponding weight that it assigned to them). In *Jeffries*, the court stated that general juror unanimity was not sufficient when the nature of the evidence presented was complex, when there was a discrepancy between the evidence and the indictment, or when some other factor was present to create a genuine possibility of juror confusion. *Id.*

177. *See, e.g.*, Cook v. State, 741 S.W.2d 928, 934-36 (Tex. 1987) (holding that the jury did not have to agree on the type of felony that supported a felony-murder conviction), *vacated on other grounds*, 488 U.S. 807 (1988); State v. Franco, 639 P.2d 1320, 1323-24 (Wash. 1982) (recognizing that convicting jurors were not required to agree on alternative methods of violation specified in a statute that addressed driving while under the influence of drugs or alcohol); People v. Sullivan, 65 N.E. 989, 996 (N.Y. 1903) (concluding that convicting jurors were not required to agree on a theory of premeditation or of felony-murder in finding the defendant guilty of first-degree murder). *See generally* Mark A. Gelowitz, Note, *Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve*, 12 QUEENS L. J. 66 (1987). *See also* Howe, *supra* note 157, at 26-35.

In Walsh v. United States, 174 F. 615 (7th Cir. 1909), *cert. denied*, 215 U.S. 609 (1910), the Court of Appeals for the Seventh Circuit held that a jury verdict will not be upset based on inconsistency where the potential for juror nonconcurrence "is in respect to immaterial particulars concerning the means by which the crime was committed." *Id.* at 620. The Court of Appeals for the Third Circuit, in United States v. Starks, 515 F.2d 112 (3d Cir. 1975), recognized the "separate crimes" standard for materiality. *Id.* at 117 n.9, 117-18.

178. See *supra* note 31 and accompanying text for a discussion of the present conflict among the circuits as to whether a "continuing series" under the CCE statute means two or three drug-related felonies.

179. 21 U.S.C. § 848(c)(2) (1988); *see supra* note 20.

180. Some courts have held that juries may convict the defendant of a crime without agreeing whether the defendant was a principal or an accessory to the offense. *See, e.g.*, State v. Wixon, 631 P.2d 1033 (Wash. App. 1981); Holland v. State, 280 N.W.2d 288 (Wis.

that the separate acts which are prohibited by a single statute are merely different ways of committing a single crime. Several courts have held that when the crime was of a "continuous" nature, and thus still "single," the jury need not concur as to which of the defendant's alleged multiple acts constituted the charged offense.[181] These courts often defer to the legislative history of the statute involved to establish that the lawmakers intended to create a single offense.[182] One court stated that, "[o]nly if the statute describes several separate and distinct offenses must there be a unanimous verdict as to each separate crime described."[183] Indeed, if the Seventh Circuit in *Canino*[184] had addressed the juror factual divergence problem in more depth, it is possible that the court would have taken this position and deferred to the legislative history of the CCE. The court might have viewed the CCE as describing a single offense in the abstract, emphasizing the fact that the predicate acts required by this provision are continuous in nature and really only amount to a single crime.

As an alternative to the distinct-crimes test, several courts have taken an approach which focuses on whether the evidence under a single charge discloses distinct *acts* which could each give rise to culpability.[185] Under this approach, courts focus on the defendant's al-

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1979), *cert. denied*, 445 U.S. 931 (1980). In addition, courts have concluded that jurors need not agree on the underlying acts that establish a conspiracy to convict the defendant. *See, e.g.*, United States v. Sutherland, 656 F.2d 1181, 1202 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).

181. *See, e.g.*, Gray v. United States, 544 A.2d 1255 (D.C. App. 1988) (concluding that convicting jurors do not have to agree on which two acts of intercourse formed the basis to convict the defendant of rape charges despite the fact that the acts occurred several minutes apart and were separated by an interruption arising from the approach of strangers and an alleged act of oral sodomy). *Cf.* Jeffries v. Blodgett, 974 F.2d 1179, 1192 (9th Cir. 1992) (finding that a "crime" or a "scheme" were merely alternative ways of committing aggregated first-degree murder and thus a specific crime was not an element of aggravating circumstance under the Washington statute); United States v. Sasser, 971 F.2d 470, 478 (10th Cir. 1992) (holding that the falsity of earnest money deposits and down payments were "intimately intertwined" and "not conceptually distinct acts," thus the district court's refusal to give a specific unanimity instruction was not an abuse of discretion), *cert. denied*, 113 S. Ct. 1292 (1993); United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983) (holding that the trial court was not required to instruct the jury that they must be in unanimous agreement on which of several instances of LSD possession formed the basis for a guilty verdict on drug-possession charges).

182. State v. Franco, 639 P.2d 1320, 1324 (Wash. 1982).

183. *Id.*; *see also* State v. Arndt, 553 P.2d 1328 (Wash. 1976).

184. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

185. *See* Scarborough v. United States, 522 A.2d 869, 873 (D.C. App. 1987) (en banc) (holding that the juror nonconcurrence issue should depend on whether "each act" alleged under a single count could be conceived separately). The distinct-acts test is a modification of a distinct-incidents test which focused on whether the evidence reveals dis-

leged acts rather than on the specific crime or crimes charged and recognize the possibility of requiring specific juror agreement as to such acts.[186]

This standard would seem to apply effectively to the CCE juror agreement problem. The predicate acts that comprise a "continuing series" are separate acts, in the sense that each is a drug-related felony.[187] Although each predicate act could not separately give rise to a continuing criminal enterprise, a combination of any two or three[188] of those acts may provide the basis for CCE culpability. Under the distinct-acts test, therefore, juror agreement in cases involving the CCE statute should be specific with respect to the predicate acts that comprise a "continuing series of violations."

One commentator has suggested that this case-by-case analysis should be composed of two steps.[189] First, the court should consider whether the evidence under a single charge establishes divisible bases for determining the defendant's guilt and, second, the court must decide when juror divergence on these different bases would undermine the decision that the defendant had committed the charged offense.[190]

In a CCE case, the government must present evidence to support its allegation that the defendant committed at least two drug-related felonies.[191] These acts must be separate and distinct in order to satisfy the "continuing series" requirement of the statute.[192] Allowing jurors to convict a defendant charged with a CCE offense without specifying upon which acts they relied to find a "continuing series" under the statute would permit conviction even when half of the jurors believed the defendant committed two particular drug-related felonies, while the remaining six jurors relied on two completely different felonies.

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tinct "incidents" that establish the defendant's guilt on a single count. *See* Howe, *supra* note 157, at 38; *see also* Derrington v. United States, 488 A.2d 1314, 1335 (D.C. App. 1985) (recognizing that factual juror nonconcurrence is a viable claim when "one charge in the indictment encompasses two separate incidents"), *cert. denied*, 486 U.S. 1009 (1988). For commentary supporting the distinct-acts test as the superior measure, see Howe, *supra* note 157, at 38. Professor Howe commented that the distinct-acts test was "more appropriate than the distinct-incidents test because it can identify more true factual nonconcurrence problems." *Id.*

186. *Scarborough*, 522 A.2d at 873; *Derrington*, 488 A.2d at 1335.

187. 21 U.S.C. § 848(c)(1) (1988); *see supra* note 20.

188. See *supra* note 31 for a discussion of the conflict among the circuits as to whether the CCE "continuing series" requires two or three predicate narcotics violations.

189. Howe, *supra* note 157, at 35-36.

190. *Id.* at 36.

191. 21 U.S.C. § 848(c)(1); *see supra* note 20.

192. § 848(c)(2); *see supra* note 20.

Such a result, which the Seventh Circuit's decision in *Canino* [193] would seem to permit, raises a substantial doubt as to what acts, if any, the defendant committed. Under due process, this doubt would bar a conviction for any of the acts individually on constitutional grounds.[194]

In some instances, juror agreement on the predicate acts that establish a continuing series would not present a problem. For instance, if only two drug-related felonies were alleged,[195] a convicting jury could have relied only on those two alleged acts. In other cases, however, such as *Canino* [196] and *Echeverri*,[197] where the government alleged a number of drug violations,[198] the issue of juror factual concurrence becomes problematic. Some factual concurrence on the predicate acts that constitute a continuing series under the CCE must be required in order to protect the defendant's due process rights.[199] This conclusion arises from the fact that the continuing series provision is an *element* of the offense[200] and the acts which comprise the continuing series are separate felonies. Substantial juror divergence on those underlying felonies raises doubt as to whether the defendant actually committed the necessary number of predicate offenses required by the CCE.

2. Number of Jurors that Must Agree

If due process requires some juror agreement as to which of the CCE predicate acts the defendant committed, the next question is, how many jurors must agree that the defendant committed a particular series of acts in order to satisfy the due process standard? The answer to this question depends upon how much juror divergence raises a "reasonable doubt" concerning the defendant's guilt or inno-

193. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

194. *See In re* Winship, 397 U.S. 358, 362 (1970) (recognizing that due process in a criminal case requires proof of guilt beyond a reasonable doubt prior to conviction); *see supra* notes 162-73 and accompanying text.

195. Two felonies would support a CCE conviction in a jurisdiction that interprets a CCE continuing series to be two or more drug-related felonies as opposed to three or more. See *supra* note 31 and accompanying text for a discussion of the dispute among the circuits as to whether a "continuing series" means two or three drug-related felonies.

196. 949 F.2d at 928.

197. United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988).

198. *See Canino*, 949 F.2d at 933 (the indictment specified five different drug-related transactions); *Echeverri*, 854 F.2d at 639 (the defendant was charged with five drug-related acts).

199. See *supra* note 162 and accompanying text for a discussion of the Supreme Court's due process standard.

200. *See supra* note 77.

cence on a particular charge. The Supreme Court has indicated that in non-capital cases with a twelve-person jury, due process requires less than complete unanimity,[201] but something more than a simple majority.[202]

In *Johnson v. Louisiana*,[203] the Court indicated that a "substantial majority" of the jurors must be in agreement on the defendant's guilt in order to convict.[204] In *Johnson*, the defendant was convicted by a nine to three verdict and the Court decided that the lack of absolute jury unanimity did not violate due process of law.[205] In a concurring opinion, Justice Blackmun suggested that he would have difficulty convicting a defendant where less than three-quarters of the jurors agreed.[206]

In a CCE case, due process requires that a substantial majority of the jurors specifically agree on which predicate acts the defendant committed to constitute a continuing series under the statute. Because of the potential for harsh minimum sentencing penalties under the

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201. The Supreme Court has left open the possibility that juror unanimity on the facts that underlie the defendant's conviction might be required in capital cases. Johnson v. Louisiana, 406 U.S. 356, 356 (1972) (noting that the state required a unanimous jury verdict in capital cases); Williams v. Florida, 399 U.S. 78, 103 (1970) (recognizing that in no state can a defendant be sentenced to death by less than 12 jurors); Burch v. Louisiana, 441 U.S. 130, 131 n.1, 138-39 (1979) (requiring unanimity of a six-person jury to convict the defendant of a non-petty offense); *accord* Apodaca v. Oregon, 406 U.S. 404, 406 n.1 (1972) (recognizing an Oregon statute that required jury unanimity in cases of first-degree murder). Support for this heightened level of juror agreement rests on the fact that a conviction in such cases results in the defendant's death. *See* Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (stating that the death penalty is significantly different from other punishments and consequently, heightened reliability of the jury's verdict of guilt in capital cases is required); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (recognizing "qualitative difference between death and other penalties" which necessitates increased reliability when the defendant is sentenced to death).

202. *Johnson*, 406 U.S. at 356 (upholding the constitutionality of a state law allowing less than unanimous guilty verdicts in non-capital cases when at least 9 of 12 jurors agreed); *Burch*, 441 U.S. at 130 (holding that where a six person jury is empaneled in a non-capital trial, a conviction required juror unanimity of the defendant's guilt); *Apodaca*, 406 U.S. at 404 (upholding the constitutionality of a state law allowing less than unanimous guilty verdicts in non-capital cases when at least 10 jurors agreed).

203. 406 U.S. at 356.

204. *Id.* at 362.

205. *Id.* at 363.

206. *Id.* at 366 (Blackmun, J., concurring). Justice Blackmun was not as clear, however, on where he would draw the line of juror agreement:

> I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out, . . . 'a substantial majority of the jury' are to be convinced. That is all that is before us in each of these cases.

Id.

CCE,[207] including the possibility of a death penalty,[208] a substantial majority in such cases should be at least three-quarters of the jury.[209] Anything less would create a reasonable doubt that would render a guilty verdict unconstitutional under the Court's standard of due process.

B. *The Supreme Court's Attempt to Deal With the Problem of Juror Divergence on Factual Issues*

The Supreme Court recently confronted the constitutional aspects of a factual juror nonconcurrence claim in *Schad v. Arizona*.[210] The Court's decision in *Schad* was its first attempt in this century to address this problem.[211] The case involved an Arizona statute which defined three ways of committing the offense of first degree murder, and the Court concluded that the jury was not required to agree upon which theory they found the defendant guilty.[212]

In *Schad*, the defendant, Edward Schad, had been convicted of violating an Arizona statute[213] which specified that the crime of first degree murder encompassed any murder that fell within one of three general categories.[214] The statute defined the crime of first degree

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207. 21 U.S.C. § 848(a) (1988) (requiring a minimum sentence of 20 years); *id.* § 848(b) (providing certain conditions for life imprisonment); *see supra* notes 23-25 and accompanying text.

208. 21 U.S.C. § 848(e) (providing certain conditions for death penalty). There is an argument to be made that CCE cases should also leave open the possibility of absolute juror unanimity on the underlying predicate acts that constitute a continuing series under the statute. See *supra* note 201 and accompanying text for a discussion of unanimity in capital cases.

209. See *supra* note 206 and accompanying text for a supporting view of Justice Blackmun, with reference to general guilty verdicts.

210. 111 S. Ct. 2491 (1991).

211. Two Supreme Court cases presented similar juror nonconcurrence claims in the late 19th century. *See* Andersen v. United States, 170 U.S. 481 (1898); St. Clair v. United States, 154 U.S. 134 (1894). In *St. Clair*, the Court did not directly address the defendant's claim that the indictment was duplicitous and simply declared that the indictment was proper. *St. Clair*, 154 U.S. at 146. Similarly, the *Andersen* Court did not definitively address the factual nonconcurrence aspect of the defendant's duplicity claim, but the Court did reject his claim that the indictment was invalid. *Andersen*, 170 U.S. at 503-04. *Cf.* Crain v. United States, 162 U.S. 625, 636 (1896) (recognizing that the alternative ways of committing fraud, which were listed in the statute, could be alleged in one count), *overruled by* Garland v. Washington, 232 U.S. 642 (1914).

212. *Schad*, 111 S. Ct. at 2503-04.

213. ARIZ. REV. STAT. ANN. § 13-452 (West Supp. 1973) (repealed 1978).

214. *Id.* The statute provided as follows:

> A murder which is perpetrated by means of poison or lying in wait, torture or by any other kind of wilful, deliberate or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree,

murder as murder that was either (1) wilful or premeditated, (2) committed in an attempt to avoid or prevent a lawful arrest or in substantiating an escape, or (3) committed during specified felonies.[215] The prosecution submitted that Schad was guilty of premeditated and felony murder[216] and the trial court charged the jury on both theories without any requirement that they agree upon which type of murder Schad had committed.[217] The jury returned a guilty verdict and Schad was sentenced to death.[218]

Although Schad had not requested separate verdicts, he claimed on appeal that the trial judge erred in failing to require the jury to issue separate verdicts on the two alleged theories of first degree murder.[219] The Supreme Court rejected his claim and concluded that premeditated murder and felony murder were merely two methods of committing a single crime.[220] Therefore, the Court held that the convicting jurors were not required to agree on the particular theory of first degree murder.[221]

A divided United States Supreme Court noted that the potential for juror disagreement on the different bases of culpability under the statute should be evaluated under the Due Process Clause of the Fifth Amendment, and not the Sixth Amendment.[222] All of the Justices indicated that factual disagreement among jurors would violate the Constitution in some instances,[223] but none of them provided clear answers regarding when and why such situations would arise to require that trial courts demand specific juror agreement on certain factual elements.

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robbery, burglary, kidnapping or mayhem or sexual molestation of a child under the age of thirteen years, is murder of the first degree. All other kinds of murder are of the second degree.

Id.; *see Schad*, 111 S. Ct. at 2495 n.1.

215. § 13-452.

216. *Schad*, 111 S. Ct. at 2495.

217. *Id.* The judge instructed the jury: "[a]ll 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty." *Id.*

218. *Id.* at 2495.

219. *Id.* at 2495-96.

220. *Id.* at 2496.

221. *Id.* Thus, the Court seemed to take the single crime approach to the Arizona statute. See *supra* notes 177-83 and accompanying text for a discussion of the single crime approach to the requirement of juror agreement.

222. *Id.* at 2498 n.5. In *Schad*, Justice Souter wrote for a plurality of four. *Id.* at 2493. Justice Scalia wrote a separate concurring opinion. *Id.* at 2505 (Scalia, J., concurring). Finally, Justice White wrote the dissenting opinion for the remaining four justices. *Id.* at 2507 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

223. See *infra* note 226 for Justice Scalia's comment regarding when juror divergence on factual issues would not be permissible.

Five Justices concluded that the Constitution does not require jurors to agree on which theory, premeditated or felony murder, the defendant was guilty as long as the State had declared that these theories were merely two ways of committing a single crime.[224] The Court indicated that the requirement of factual juror agreement would only apply to the "elements" of a crime.[225] One of these five Justices, Justice Scalia, did not join the plurality opinion because he disagreed with the deference it gave to a state's definition of what constitutes a single crime.[226] The dissenting opinion, written by Justice White, concluded that juror agreement on the alternative theories of first degree murder was always required for a conviction to be constitutional.[227]

The plurality, in an opinion written by Justice Souter, concluded that a general unanimity instruction was sufficient for two reasons. First, the Court found that the distinct requisite mental states required under the state statute[228] reflected equal notions of blameworthiness and that Arizona had indicated, through repeated supreme court decisions,[229] that premeditated murder and felony murder were not separate crimes, but two ways of committing a single crime.[230] Second, the statute's approach of equating two mental states, either of which would satisfy the crime of first degree murder, was historically recognized.[231] Justice Souter went no further in articulating the basis for a conclusion that the Arizona practice was constitutional. He indicated, however, that where a single offense could be committed by alternate modes that appeared to involve different degrees of culpability, the

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224. *Schad*, 111 S. Ct. at 2496. Justice Souter, Chief Justice Rehnquist, Justice O'Connor, Justice Scalia, and Justice Kennedy came to this conclusion.

225. *Id.* at 2499-500. See *supra* note 77 for a discussion of "continuing series" provision of the CCE as an element of that offense.

226. *Id.* at 2505 (Scalia, J., concurring). In addition, Justice Scalia pointed out, "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Id.* at 2507.

227. *Id.* at 2507 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

228. ARIZ. REV. STAT. ANN. § 13-452 (West Supp. 1973) (repealed 1978); *see supra* note 214.

229. *See* State v. Schad, 788 P.2d 1162, 1168 (Ariz. 1989); State v. Encinas, 647 P.2d 624 (Ariz. 1982).

230. *Schad*, 111 S. Ct. at 2498; *see also Schad*, 788 P.2d at 1168 (indicating that premeditated murder and felony murder were two ways of committing a single crime); *Encinas*, 647 P.2d at 627 (declining to require an instruction that jurors in a first-degree murder case must agree as between premeditated and felony-murder theories).

231. *Schad*, 111 S. Ct. at 2502. Justice Souter concluded that "[a]merican jurisdictions have modified the common law by legislation classifying murder by degrees, the resulting statutes have in most cases retained premeditated murder and some form of felony murder . . . as alternative means of satisfying the mental state that first-degree murder presupposes." *Id.*

Constitution might necessitate treatment of those modes of conduct as separate crimes.[232] In addition, Justice Souter noted that other factors might be relevant to the question, but he did not explain what those factors were.[233]

For the dissent, Justice White concluded that the due process principles of *Winship*[234] required that the prosecution prove and the jury agree on the facts necessary to constitute the crime at issue "beyond a reasonable doubt."[235] The dissent reasoned that the possibility of juror divergence on the mens rea elements of first degree murder under the Arizona statute created a reasonable doubt which would make the conviction unconstitutional under due process standards.[236] Justice White seemed to adopt a "separate-crime" criteria for determining when materially different bases of culpability are present.[237]

The state statute at issue in *Schad* involved a single act, first degree murder, that could have been achieved by one of three criminal means. It can be distinguished from cases involving multiple offenses.[238] The Fifth Circuit has recognized, in a case involving various perjury violations, that the circumstances in *Schad* differ "from the situation where a single count as submitted to the jury embraces two or more separate offenses, though each be a violation of the same statute."[239] Commission of a CCE involves at least two or three violative acts,[240] each of which is a drug-related crime.[241] The *Schad* Court did

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232. *Id.* at 2503.

233. *Id.* at 2504. Justice Souter stated,

> We would not warrant that these considerations exhaust the universe of those potentially relevant to judgments about the legitimacy of defining certain facts as mere means to the commission of one offense. But they do suffice to persuade us that the jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality.

Id.

234. *In re* Winship, 397 U.S. 358 (1970); *see supra* note 162 and accompanying text.

235. *Schad*, 111 S. Ct. at 2508 (White, J., dissenting) (quoting *Winship*, 397 U.S. at 364).

236. *Id.* at 2509.

237. *Id.* at 2510. Justice White presented a hypothetical that demonstrated an immaterial fact that would not require juror agreement. He stated that a factual issue in the case of a burglary where there was a dispute as to whether the defendant pried a window open with a screwdriver or a crowbar would be immaterial. *Id.* See *supra* notes 177-83 and accompanying text for a discussion of the distinct-crimes theory as it relates to the juror nonconcurrence problem.

238. The *Schad* plurality expressly limited its decision to the facts of the case before it. *Schad*, 111 S. Ct. at 2504. Indeed, Justice Scalia, emphasized this point in his *Schad* concurrence. *Id.* at 2507 (Scalia, J., concurring); *see supra* note 226.

239. United States v. Holley, 942 F.2d 916, 927 (5th Cir. 1991).

240. 21 U.S.C. § 848(c)(2) (1988); *see supra* note 20.

241. *See supra* note 30 and accompanying text.

not clearly define what circumstances would necessitate specific juror agreement, but indicated that such agreement would be required with respect to "independent elements" of a crime.[242]

The *Schad* Court determined that the alternative ways of committing first degree murder under the Arizona statute were not elements of that offense, however, in a CCE case, the "continuing series" provision constitutes an independent element of the CCE.[243]

C. *Due Process Requirements of Juror Unanimity on the Continuing Series Element of the CCE*

Due process guarantees the defendant the right to a conviction based upon proof beyond a reasonable doubt.[244] When the jurors in a CCE case cannot agree upon which acts the defendant has committed, not only does the verdict lack proof beyond a reasonable doubt as to each of the predicate offenses individually, but there is also a reasonable doubt as to the CCE violation as a whole. If six jurors are convinced that the defendant committed predicate crimes "A," "B," and "C," and six are convinced that the defendant committed predicate crimes "D," "E," and "F," there is not a clear consensus that the defendant committed any of the predicate crimes because only half of the jurors agree that the defendant committed any individual offense.[245] Based on the *Winship* standard of due process,[246] this type of juror divergence on the CCE predicate acts raises a reasonable doubt as to whether the defendant actually engaged in a continuing criminal enterprise. A conviction under such circumstances, which the *Canino*[247] decision would seem to permit, would be contrary to the Court's established standard of due process.[248]

In a CCE case, the jury should be instructed that they must agree, by a substantial majority, on which of the defendant's alleged acts they relied to find a "continuing series" under the statute. Furthermore,

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242. *Schad*, 111 S. Ct. at 2499.

243. *See supra* note 77.

244. *In re* Winship, 397 U.S. 358, 362 (1970); *see supra* notes 162-73 and accompanying text.

245. The *Schad* facts present a different situation. In *Schad*, if six jurors were convinced that Schad had committed premeditated murder and six were convinced that he had committed felony murder, all of the jurors would still be in unanimous agreement that the defendant had committed the act of murder. The Court's opinion would seem to indicate that such a scenario would not be sufficient to raise a reasonable doubt for purposes of the Due Process Clause of the Fifth Amendment. *Schad*, 111 S. Ct. at 2503-04.

246. *Winship*, 397 U.S. at 359-64.

247. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

248. *See supra* note 162 and accompanying text.

the harsh sentencing provisions of the CCE,[249] including certain conditions for the death penalty,[250] prompt the conclusion that no less than three-quarters of the jury must agree on the defendant's predicate acts.[251]

While the *Schad* Court did not require specific juror agreement on the mens rea provisions of an Arizona first degree murder statute,[252] the Court did indicate that such agreement would be required on the *elements* of a crime.[253] The "continuing series" provision of the CCE was intended as an element of the overall CCE offense.[254] Moreover, while the defendant in *Schad* was convicted of only *one* criminal act that he could have committed in a number of ways, in CCE cases, the government presents a number of separate acts to the jury. Even if the jury in *Schad* disagreed as to the manner in which the crime of first degree murder occurred, there would still be proof beyond a reasonable doubt that a murder was committed. Conversely, in a case involving the CCE, if the jury disagreed as to the predicate acts the defendant had committed, there would be a reasonable doubt as to whether a "continuing series" of violations existed at all. The mens rea alternate ways of committing first degree murder under the Arizona statute must be distinguished from the predicate crimes required for a conviction of a CCE offense, as the latter represent distinct criminal acts which form the basis for CCE conviction.

The Supreme Court's attempt to address juror divergence on factual issues did not go far enough to delineate when specific agreement among jurors should be required. Cases involving the CCE represent a situation where a substantial majority of the jurors should be required to agree on the predicate act violations which constitute a "continuing series" under the statute. In order to address the practical problem of assuring that the necessary agreement exists in a particular case, it may be helpful to compare the use of special verdicts in the courts to assure juror agreement in cases involving a complex statu-

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249. 21 U.S.C. § 848(a) (1988).

250. *Id.* § 848(e).

251. See *supra* note 206 and accompanying text for a discussion of Justice Blackmun's concurrence in Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring), concluding that the defendant's due process rights would be violated by allowing a jury to convict when less than three-quarters of the jurors are convinced.

252. *See supra* text accompanying note 215.

253. Schad v. Arizona, 111 S. Ct. 2491, 2499-500 (1991).

254. *See supra* note 77. The dissent in *Schad* would most likely categorize the predicate acts that constitute a CCE "continuing series" as separate crimes, deserving of specific juror agreement. *Schad*, 111 S. Ct. at 2510 (White, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

tory crime, similar in structure to the CCE—the Racketeer Influenced and Corrupt Organizations Act ("RICO").[255]

D. *Comparison of the CCE with RICO*

Like the CCE provision of the Controlled Substances Act,[256] RICO describes a complex statutory crime. Both statutes respond to the special dangers and problems involved with organized crime, and both attempt to counteract the growing influence of organized crime over the nation's economic and political bodies.[257] While the CCE is specifically targeted at the organizers and supervisors of large drug rings,[258] RICO takes aim at all organized crime.[259] Under RICO, it is unlawful for any individual to be part of an "enterprise"[260] "through a pattern of racketeering activity."[261] The RICO statute does not expressly define "pattern of racketeering activity," and the meaning of this element currently represents one of the most controversial issues of interpretation arising under RICO.[262] However, the term "pattern"

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255. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, § 901, 84 Stat. 922, 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1988)).

256. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408, 84 Stat. 1265 (codified as amended at 21 U.S.C. § 848 (1988)).

257. *See, e.g.*, Organized Crime Control Act of 1970, *Statement of Findings and Purpose*, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

258. 21 U.S.C. § 848(b) (1988); *see supra* note 21 and accompanying text.

259. Various courts have recognized that the purpose of RICO is to eradicate corruption caused by organized crime. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (recognizing that in enacting RICO Congress intended to reach both "legitimate" and "illegitimate" enterprises); United States v. Paone, 782 F.2d 386, 393 (2d Cir. 1986) (concluding that Congress meant to define the wrongful conduct that constitutes the predicate acts for a federal racketeering charge in a more generic sense), *cert. denied*, 483 U.S. 1019 (1987); United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982) (holding that RICO was intended to eradicate organized crime rather than to subject average criminals to the chapter's increased punishment), *cert. denied*, 459 U.S. 1110 (1983); United States v. Angelilli, 660 F.2d 23, 33 (2d Cir. 1981) (recognizing that Congress intended RICO to be interpreted to apply to activities that corrupt public entities), *cert. denied*, 455 U.S. 910 (1982).

260. 18 U.S.C. § 1961(4) (1988). The RICO statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* Such an enterprise can arise in several forms. *See* United States v. Turkette, 452 U.S. 576, 580-93 (1981) (including both legitimate and illegitimate organizations in the definition of a RICO "enterprise"); United States v. Castellano, 610 F. Supp. 1359, 1399 (S.D.N.Y. 1985) (holding that the existence of an enterprise may be established if the government proves that a group of persons with common goals, collective interests, and an ongoing body of personnel exists).

261. 18 U.S.C. § 1962(c) (1988).

262. 18 U.S.C. §§ 1961-1968. *See* Michael Goldsmith, *RICO and "Pattern:"* [sic] *The Search for "Continuity Plus Relationship,"* 73 CORNELL L. REV. 971 (1988); Ethan M. Posner, Note, *Clarifying a "Pattern" of Confusion: A Multi-factor Approach to Civil RICO's Pattern Requirement*, 86 MICH. L. REV. 1745, 1748 (1988); Stephen G. Harvey,

is defined in the statute and requires at least two predicate acts of "racketeering activity" within ten years of one another.[263]

The "continuing series" element of the CCE can be equated to the "pattern" provision of RICO[264] in that both require the defendant to commit a number of illegal acts which constitute the larger offense.[265]

Note, *The Pattern Requirement in Civil RICO is Working: Case Law After* Sedima, 33 VILL. L. REV. 205, 209 (1988) (noting extensive split of authority).

263. 18 U.S.C. § 1961(5). The RICO statute defines "racketeering activity" as "predicate acts" including any act or threat in violation of any of eight specified state felonies or 25 specified federal offenses, including any violation punishable under the federal mail, wire, and securities fraud statutes. 18 U.S.C. § 1961(1).

The Supreme Court has commented on the "pattern" element, stating that the legislative history of RICO indicates that "two isolated acts of racketeering activity do not constitute a pattern." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985). The Court discussed the concept of continuity as the basis for a RICO pattern and held that the predicate acts of racketeering activity under RICO must be continuous and related to constitute a "pattern" under the statute. *Id.* Since *Sedima*, the Supreme Court has recognized that Congress intended that RICO have "a more stringent [pattern] requirement than proof simply of two predicates." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989); *see also* Roeder v. Alpha Indus., Inc., 814 F.2d 22, 30 (1st Cir. 1987) ("Racketeering acts, then, do not constitute a pattern simply because they number two or more."), *cert. denied*, 484 U.S. 1006 (1988).

264. *See infra* note 265 and accompanying text.

In United States v. Echeverri, 854 F.2d 638, 643 (3d Cir. 1988), the United States Court of Appeals for the Third Circuit acknowledged the similarity between the RICO and CCE charges in its discussion of the CCE. The *Echeverri* court commented,

> Moreover, with respect to the RICO count, a *count analogous to the CCE count* in question here, the district court gave a careful unanimity instruction regarding the predicate acts and issued special verdict forms which required the jury to designate the specific predicate acts upon which they had unanimously agreed.

Id. (emphasis added). The court went on to state that due to the absence of similar specific unanimity instructions with respect to the elements constituting a "continuing series" under the CCE charge, the jury may have erroneously inferred that such specific unanimity on that charge was unnecessary. *Id.* Had the trial court used a similar instruction regarding the "continuing series" element of the CCE count, unanimity would not have posed the problem that it did on appeal.

265. The relevant portion of the RICO statute states as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a *pattern of racketeering activity* or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988) (emphasis added).

The relevant portion of the CCE statute states as follows: "For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if . . . (2) such violation is part of a *continuing series of violations* of this subchapter or subchapter II of this chapter." 21 U.S.C. § 848(c) (1988) (emphasis added).

There are, however, differences between the two statutes that might discourage comparison of them. First, the RICO "pattern" must be undertaken within certain time limitations to achieve the statute's goal of punishing continuous racketeering activity. 18 U.S.C. § 1961(5) (stating a time limitation of 10 years). Conversely, the CCE "continuing series" element does not contain any time limitations. Instead, that CCE element requires that the

The RICO statute, like the CCE, does not expressly address the problem of juror agreement with respect to the requisite predicate offenses. Consequently, a conflict has arisen among the circuits as to whether a RICO conviction will survive after some of the defendant's predicate act convictions, forming the basis for the RICO conviction, are vacated, but at least two of those convictions remain.[266] At the heart of this conflict is the juror concurrence problem. If the jury were required to specifically agree upon which of the defendant's acts constituted a RICO pattern, this conflict would not present a problem. Such specific agreement, made clear through the use of special verdict forms,[267] would specifically provide the grounds upon which the defendant was convicted and, therefore, prevent any confusion as to which acts the jury found to constitute a RICO pattern. The majority of jurisdictions uphold the RICO conviction after one or more predicate act convictions are vacated on appeal,[268] while a minority would vacate the RICO conviction.[269]

As a solution to this problem, the United States Court of Appeals for the Second Circuit in *United States v. Coonan*[270] suggested a process of bifurcating jury deliberations into two segments.[271] First, the

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defendant act "in concert with five or more" underlings in order to assure that the CCE violator holds a position of authority within a particular drug ring and is indeed a "kingpin." 21 U.S.C. § 848(c)(2)(A); *see supra* note 20. Second, the CCE seeks to punish not only a certain type of activity, but also a certain type of individual. *See supra* notes 21-22 and accompanying text. RICO, on the other hand, focuses solely on the defendant's activity. *See supra* notes 259-61 and accompanying text. Despite these differences, the two statutes are quite similar in structure. Both CCE and RICO define complex statutory crimes. *See supra* note 26 and accompanying text. In addition, both statutes give rise to similar juror unanimity problems because they each require that the defendant commit a number of predicate acts in order to be found guilty of the charged offense. 18 U.S.C. § 1962(c); 21 U.S.C. § 848(c)(2).

266. *See* United States v. McCulloch, No. 86 Crim. 3453 (11th Cir. June 8, 1987), *cert. denied*, 484 U.S. 947 (1987) (White, J., dissenting from denial of certiorari); *see also* Debra L. Weber, Comment, *Reversal of a RICO Predicate Offense on Appeal: Should the RICO Count Be Vacated?*, 27 SAN DIEGO L. REV. 183, 185 (1990).

A RICO conviction must be vacated when all convictions for predicate racketeering acts that formed the basis of the RICO conviction are vacated. United States v. Walgren, 885 F.2d 1417, 1424 (9th Cir. 1989).

267. *See infra* notes 307-17 and accompanying text.

268. United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983). For a thorough discussion of the majority view on this issue, see Weber, *supra* note 266, at 193-95.

269. United States v. Brown, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979). For a thorough discussion of the minority view on this issue, see Weber, *supra* note 266, at 191-93. The Weber Comment also discusses RICO with respect to verdict consistency. *Id.* at 186-91.

270. 839 F.2d 886 (2d Cir. 1988), *cert. denied*, 112 S. Ct. 1486 (1992).

271. *Id.* at 889-90. The court's solution did not address the unanimity problem, but

jury would consider the defendant's participation in the alleged predicate "pattern of racketeering activity" offenses by responding to special interrogatories addressing those offenses.[272] Only after responding to those interrogatories, and finding that the defendant had committed the requisite predicate acts, would the jury be advised of the fact that a RICO conviction required two predicate acts.[273] Second, the jury would be instructed on the requirements of a RICO violation in order to arrive at a general verdict on that count.[274] By eliciting specific answers from the jury regarding the defendant's predicate offenses at the outset, the court would be certain as to precisely what acts the jury found the defendant had committed.[275] The court in *Coonan* commented that the second RICO instruction would not take away any of the jury's fact-finding duties[276] because the charge "does not either refer to 'patterns' or require the jury to count the number of predicate acts proven against each defendant."[277]

Special verdicts are another option, similar in form to the jury interrogatories discussed in *Coonan*,[278] that a court may use to clarify jury findings in complex cases.[279] Special verdicts contain specific re-

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did provide a useful mechanism for clarifying the acts on which the jury relied to convict the defendant.

272. *Id.* at 889.

273. *Id.* at 889 n.3.

274. *Id.* at 889-90.

275. *Id.* at 891.

276. The *Coonan* dissent was concerned that the special findings suggested by the majority would take away the jury's traditional role of fact-finder and run counter to what it called a customary preference for general verdicts in criminal cases. *Id.* at 897 (Altimari, J., dissenting). The dissenting judge was concerned that the court "should not quickly dismiss any encroachment into the rarely-challenged domain of the jury." *Id.* at 896. He stated that this protection arises primarily from the defendant's right to a "fair trial," allowing jurors to evaluate the law in light of the facts "without public scrutiny or legal intervention." *Id.* at 896-97. The dissent feared that procuring " 'yes' or 'no' answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal." *Id.* at 897 (quoting United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir.) (Newman, J., concurring in part and dissenting in part), *cert. denied*, 469 U.S. 831 (1984)).

277. *Coonan*, 839 F.2d at 889 n.3.

278. *Id.* at 889. As noted by Judge Newman in *Ruggiero*, the term "special verdict" is often used to mean jury interrogatory. *Ruggiero*, 726 F.2d at 926 n.1 (Newman, J., concurring in part and dissenting in part). Nonetheless, Federal Rule of Civil Procedure 49 states that the courts may use special verdicts to procure detailed responses in place of a general verdict, while jury interrogatories procure detailed findings in concert with a general verdict. FED. R. CIV. P. 49; *see* United States v. Pforzheimer, 826 F.2d 200, 205 n.1 (2d Cir. 1987).

279. *See* FED. R. CIV. P. 49(a) (1987). The relevant portion of that rule states,

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the

sponses by the jury to a set of questions that the court has submitted.[280] They serve the purpose of eliminating uncertainty in cases involving multiple theories of recovery to reveal "the whole case for what it is, both fact and law, for complete and final acceptance of the correct legal theory by the reviewing Court."[281]

Although the *Federal Rules of Civil Procedure* sanction the use of special verdicts in civil cases,[282] courts disfavor their use in the criminal arena.[283] Courts view special verdicts in criminal cases as judicial interference with the jury's duty[284] because eliciting such specific responses creates a threat of judicial overbearance on the jurors, who should be free "from judicial pressure, both contemporaneous and subsequent."[285]

Special verdicts are, however, permitted in some criminal cases.[286] For instance, in criminal conspiracy cases, courts have recognized the suitability of special verdicts when the conspiracy has

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court may submit to the jury written questions . . . or may submit written forms of the several special findings which might properly be made under the pleadings and evidence . . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue.

Id.

280. Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985).

281. Chief Judge John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 345 (1968).

282. *See* FED. R. CIV. P. 49(a) (allowing special verdicts in federal civil cases at the discretion of the court).

283. *See, e.g.*, United States v. Orozco-Prada, 732 F.2d 1076, 1084 (2d Cir.) (acknowledging that the United States Court of Appeals for the Second Circuit had indicated that special verdicts were not generally favored in criminal cases, but upholding their use when the information sought was relevant to the sentence being imposed), *cert. denied*, 469 U.S. 845 (1984); United States v. Ruggiero, 726 F.2d 913, 926 (2d Cir.) (Newman, J., concurring in part, dissenting in part) (recognizing that in some cases courts disfavor jury interrogatories in criminal cases), *cert. denied*, 469 U.S. 831 (1984); United States v. Murray, 618 F.2d 892, 895 n.3 (2d Cir. 1980); United States v. Stassi, 544 F.2d 579, 583-84 (2d Cir. 1976) (stating that special verdicts are improper in criminal cases except where relevant to the sentence being imposed), *cert. denied*, 430 U.S. 907 (1977); *see also* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 512 (1971 & Supp. 1981) (asserting that the criminal jury's function does not stop at fact finding).

284. United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969).

285. *Id.*

286. *See* United States v. Torres Lopez, 851 F.2d 520, 523 (1st Cir. 1988) (reproducing special verdict form and illustrating how it simplified the function of the reviewing court), *cert. denied*, 489 U.S. 1021 (1989); *Spock*, 416 F.2d at 182 n.41 (1st Cir. 1969) (citing authorities under which special verdicts were permitted in criminal cases); *see also* United States v. Washington, 782 F.2d 807, 822-24 (9th Cir. 1986) (providing for an alternative special verdict form).

more than one object,[287] or when the special verdict questions seek information that is relevant to the defendant's sentence.[288] In fact, in *Schad v. Arizona*,[289] the Court recognized the Supreme Court of Arizona's use of separate verdict forms in cases where alternative theories of the defendant's guilt were submitted to the jury.[290]

In addition, Rule 31(e) of the *Federal Rules of Criminal Procedure* sanctions the use of special verdicts in criminal forfeiture cases.[291] *United States v. Angiulo*,[292] for example, was a RICO case in which the jury, as part of its overall verdict, returned a special verdict form finding a variety of the defendant's assets to be subject to forfeiture.[293] Furthermore, the Supreme Court has recognized the legitimacy of special verdicts in capital punishment cases.[294]

In RICO cases where a juror concurrence issue arises under the "pattern" element,[295] some courts have indicated that the jury must

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287. *Orozco-Prada*, 732 F.2d at 1083. In *Orozco-Prada*, the court concluded that the defendant's sentence was defective because the court could not determine the basis of his guilt. The indictment charged the defendant with a conspiracy that was punishable under two different sections of a federal statute, which each established different sentencing periods—one for cocaine-related conspiracies, which authorized a 15-year sentence and the other for marijuana-related conspiracies, which authorized a five-year sentence. *Id.* Without a special verdict, the court could not determine whether the object of the conspiracy was cocaine, marijuana, or both. *Id.*

288. United States v. Owens III, 904 F.2d 411, 415 (8th Cir. 1990); United States v. McNeese, 901 F.2d 585, 605 (7th Cir. 1990); United States v. Buishas, 791 F.2d 1310, 1317 (7th Cir. 1986); *Orozco-Prada*, 732 F.2d at 1084.

289. 111 S. Ct. 2491, 2504 (1991); *see supra* notes 210-37 and accompanying text.

290. *Schad*, 111 S. Ct. at 2504; *see* State v. Smith, 774 P.2d 811, 817 (Ariz. 1989).

291. Federal Rule of Criminal Procedure 31(e) states as follows: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." FED. R. CRIM. P. 31(e); *see also* United States v. Angiulo, 897 F.2d 1169, 1209 (1st Cir.) (recognizing use of special verdict forms under the forfeiture aspects of RICO), *cert. denied*, 498 U.S. 845 (1990).

292. *Angiulo*, 897 F.2d at 1209-16.

293. *Id.* at 1209.

294. *See* Franklin v. Lynaugh, 487 U.S. 164, 181-82 (1988). In *Franklin*, the Court stated that it has never permitted unlimited juror discretion. *Id.* at 181. The Court indicated that the jury's discretion may be limited, the jury's consideration of mitigating evidence may be directed, and in capital sentencing, states may channel jury discretion in an attempt to reach a fair implementation of the death penalty. *Id.*

295. In some RICO cases, unanimity does not present a problem. When the defendant is separately convicted of two predicate acts which combine to establish a RICO pattern, for example, juror unanimity is not an issue because there is no question as to upon what acts the jury relied to find a RICO "pattern." *See* United States v. Weisman, 624 F.2d 1118, 1124 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). In *Weisman*, the district court's separate convictions on each of the predicate acts of the RICO charge assured the Court of Appeals for the Second Circuit that the jury had unanimously found the defendant guilty of committing a "pattern" under RICO. *Id.* at 1124. It is when a number of predicate acts are alleged and not separately proven that the issue of juror unanimity arises

specifically agree upon which two racketeering acts a particular defendant committed[296] and some have indicated the value of special verdicts.[297] For instance, in *United States v. Ruggiero*,[298] the United States Court of Appeals for the Second Circuit reversed a RICO conviction because the reviewing court could not be sure from the jury's general verdict at trial whether the jury's findings of guilt were based on two or more legally adequate predicate acts.[299] In remanding for a new trial on the RICO charge, the court recommended that the trial judge "request the jury to record their specific dispositions on the separate predicate acts charged, in addition to their verdict of guilt or innocence on the RICO charge."[300]

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because there is uncertainty as to precisely which acts the jury relied on to find a pattern of racketeering activity. See *supra* text accompanying notes 195-200 for a discussion of when a factual concurrence problem arises under the CCE.

296. United States v. Stodola, 953 F.2d 266, 272 n.4 (7th Cir.) (upholding the sufficiency of the district court's instruction, which charged, "You must be unanimous in your agreement as to what constitutes the two or more acts."), *cert. denied*, 113 S. Ct. 104 (1992); United States v. Madeoy, 912 F.2d 1486, 1495 (D.C. Cir. 1990) (recognizing the validity of the district court's special forfeiture verdict, which instructed the jury that they must "unanimously" agree upon the racketeering acts that a "particular defendant committed in reaching the verdict"), *cert. denied*, 111 S. Ct. 1008 (1991); United States v. Pungitore, 910 F.2d 1084, 1136 n.74 (3d Cir. 1990) (stating in dicta that the district court's jury interrogatories on the RICO count, submitted during jury deliberation, were proper), *cert. denied*, 111 S. Ct. 2010 (1991); United States v. Echeverri, 854 F.2d 638, 648 (3d Cir. 1988) (upholding the district court's use of special verdict forms, which established specific juror unanimity).

297. *Echeverri*, 854 F.2d at 648; United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984).

298. *Ruggiero*, 726 F.2d at 913. In *United States v. Coonan*, the dissent cited *Ruggiero* as one of the "limited" circumstances that would warrant limitation on the jury's power to render general verdicts. United States v. Coonan, 839 F.2d 886, 897 (2d Cir. 1988); *see also* United States v. Pforzheimer, 826 F.2d 200, 205-06 (2d Cir. 1987); *Ruggiero*, 726 F.2d at 922-23, 925-28.

299. *Ruggiero*, 726 F.2d at 921. In *Ruggiero*, the defendant was charged, in count one, with involvement in eight conspiracies which were the predicate offenses to indicate a RICO "pattern of racketeering" activity. *Id.*

300. *Id.* at 923. In RICO cases where the trial court had utilized special verdicts, the appellate courts had a clear picture of upon which of the defendant's acts the jury had relied to convict. *See* United States v. Walsh, 700 F.2d 846, 851-52 (2d Cir.) (finding the evidence sufficient to uphold the trial court's conviction under RICO where the jury, by special verdict, found the defendant had committed nine predicate offenses prior to the five-year statute of limitations for non-capital cases and six predicate offenses within the limitations date, from which the appellate court concluded that the RICO pattern was satisfied), *cert. denied*, 464 U.S. 825 (1983); United States v. Angelilli, 660 F.2d 23, 30 (2d Cir. 1981) (affirming the trial court's RICO conviction wherein the jury was asked to state, as to each specific transaction, whether it was proved beyond a reasonable doubt), *cert. denied*, 455 U.S. 945 (1982).

Where the trial court permitted only a general verdict on the RICO count, however, the appellate court confronted more of a problem. *See* United States v. Quicksey, 525 F.2d 337, 340-41 (4th Cir. 1975) (upholding the trial court's conviction as long as the govern-

In *Echeverri*,[301] the defendant was accused of both a CCE and a RICO offense.[302] The appellate court noted that the district court gave a careful unanimity instruction on the RICO count with regard to the predicate acts required thereunder.[303] Furthermore, the district court required the jury, on special verdict forms, to specify the predicate RICO acts upon which they had unanimously agreed.[304] The verdict forms revealed unanimous agreement among the jurors that the defendant had participated in conspiracy to possess and distribute controlled substances and had possessed cocaine with the intent to distribute, acts which constituted a RICO "pattern."[305] The district court utilized the special verdict form to clarify which of the defendant's acts the jury found to constitute a "pattern" under RICO.[306]

Similarly, the use of special verdicts in CCE cases would eliminate any uncertainty with regard to precisely which of the defendant's acts the jury's conviction was premised upon.[307] *United States v. Becton*[308] was the first CCE case to suggest the use of special verdicts.[309] The United States Court of Appeals for the Eighth Circuit stated that it is "far preferable to list the felonies comprising the criminal enterprise in the CCE count of an indictment, thereby eliminating the potential problems suggested by [the defendant]."[310] Such a procedure

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ment agreed to re-sentencing, and stating that, "in the absence of a special verdict, it is not possible to ascertain whether the jury intended to find the defendants guilty of conspiracy to violate the Travel Act or the Drug Act, or both Acts"), *cert. denied*, 423 U.S. 1087 (1976).

301. United States v. Echeverri, 854 F.2d 638 (3d Cir. 1988); *see supra* notes 89-117 and accompanying text.

302. *Echeverri*, 854 F.2d at 639.

303. *Id.* at 643.

304. *Id.* After the jury had reached a guilty verdict on the substantive RICO count, the court instructed the jury to return to the jury room to specify, on a special verdict form, which racketeering acts they had unanimously found the defendants to have committed. *Id.* at 648. Presumably, if the verdict form revealed less than unanimity on those predicate acts, the RICO conviction would not stand.

305. *Id.*

306. *Id.* As one commentator has noted, the use of special verdicts in RICO cases would solve the conflict of whether a RICO conviction could stand after some, but not all, of the defendant's predicate act convictions were vacated. Weber, *supra* note 266, at 203; *see supra* notes 266-69 and accompanying text. If a special verdict had been used in such a situation, the reviewing court could simply look to the jury's responses to determine upon which acts the jury had relied to convict the defendant under RICO.

307. *See also* United States v. Roman, 870 F.2d 65, 72-73 (2d Cir. 1989) (recognizing the possibility of the use of special interrogatories in CCE cases, but not allowing them in a case where the defendant failed to preserve his right to such interrogatories at trial), *cert. denied*, 490 U.S. 1109 (1991).

308. 751 F.2d 250 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985).

309. *Id.* at 257.

310. *Id.* The defendant, Becton, alleged on appeal that the indictment was imper-

would assure that only drug "kingpins" were convicted under CCE and subject to the statute's harsh penalties.[311] Additionally, special verdicts in these cases would eliminate the potential for confusion as to whether a CCE conviction could stand if one or more of the defendant's predicate offenses were vacated.[312]

The complexity of statutes like RICO and the CCE gives rise to the issue of whether the jury must agree on the predicate acts that the defendant committed to constitute the substantive RICO or CCE offense. Several RICO cases and one CCE case have encouraged the use of special verdicts in order to clarify jury findings on those predicate offenses.[313] If a substantial majority of the jurors in a CCE case must agree on the underlying predicate offenses the defendant has committed to constitute a "continuing series" under the statute, the use of special verdicts would provide a clear picture of those predicate acts upon which the jury had relied to convict the defendant of a CCE offense. Although there are drawbacks in requiring such specific agreement,[314] in CCE cases a heightened level of juror concurrence on the underlying statutory predicate acts should be required in order to avoid the possibility of a reasonable doubt concerning the defendant's culpability.[315] Through an augmented jury instruction, or through the use of special verdicts, the trial court could assure such juror agreement. Requiring a certain degree of factual specificity is a small price to assure the "indispensable element"[316] of juror agreement. Given the array of theories and predicate offenses asserted by the prosecution in cases involving complex statutory crimes like RICO and CCE, special verdicts are a more appropriate procedural device than general verdicts to ensure the defendant's right to proof beyond a reasonable doubt.[317]

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missibly vague and therefore violative of due process, and that the indictment should have listed the alleged felonies in order to protect him from double jeopardy. *Id.* at 256.

311. See *supra* notes 23-25 for a discussion of the penalties for a CCE violation.

312. See *supra* note 266 and accompanying text for a reference to this problem in RICO cases.

313. *See supra* notes 296-308 and accompanying text.

314. *See supra* note 276. Drawbacks include the possible usurpation of the jury's traditional role of fact-finder, a limit on the jury's power to render a general verdict of guilt, and influence from outside forces on the jury's decision-making process.

315. *See supra* notes 191-200 and accompanying text.

316. United States v. Ryan, 828 F.2d 1010, 1020 (3d Cir. 1987) (holding that the district court's instructions were inadequate in a case involving false statements made to a federally insured bank, and the lower court should have augmented its instruction where one count was submitted to the jury on alternative theories).

317. *See supra* notes 162-209 and accompanying text.

The "continuing series" element of the CCE[318] was intended to limit the statute's coverage by targeting only those violators who fill the role of drug "kingpin." The *Canino*[319] court's analogy between the "continuing series" and "five or more underlings" elements of the statute[320] failed to consider the dangers involved in permitting juror divergence on the predicate acts that comprise a CCE "continuing series." Failing to require substantial juror agreement presents a significant potential for CCE conviction when a reasonable doubt still exists because a significant portion of the jury could not agree upon which predicate acts the defendant actually committed. While the danger of doubt, resulting from juror disagreement, might also exist with respect to the "five or more underlings" requirement, such doubt is of no consequence if that part of the CCE is not an element. Specific juror agreement, implemented by a special verdict form for the "continuing series" element of the CCE, would secure significant juror agreement and protect the defendant's due process rights.[321]

CONCLUSION

The drug problem in the United States has grown to catastrophic proportions and is no doubt a contributing factor to many other societal problems that exist today. One of the federal government's most powerful weapons in its arsenal against serious drug violators is the CCE. Courts have repeatedly upheld the CCE's harsh penalties as constitutional.[322] The statute was meant to both penalize and rehabilitate major drug lords in an effort to attack the drug problem from the top of the drug ring chain of command.[323]

When it launched this major effort in the "war on drugs," Congress never intended to infringe upon the criminal defendant's due

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318. As for the "five or more underlings" provision of the CCE statute, it may be peripheral to the statutory purpose. *See* United States v. Jackson, 879 F.2d 85, 88-89 (3d Cir. 1989); *see supra* notes 137-41 and accompanying text. Support for the *Jackson* rationale lies in the fact that all but one of the circuits that have addressed the issue recognize that the identities of the five or more underlings need not be specified in the jury's verdict. *See supra* note 80 and accompanying text. This tends to indicate a general consensus throughout the circuits that the "five or more underlings" provision is indeed peripheral to the CCE's purpose.

319. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

320. *Id.* at 946; *see supra* notes 149-51 and accompanying text.

321. *See supra* notes 162-209 and accompanying text.

322. *See supra* note 48.

323. *See supra* notes 21-22 and accompanying text.

process rights. It seems, however, that decisions like *Canino*[324] serve to slowly erode this right in CCE cases. Allowing the type of juror divergence that the Seventh Circuit permits, creates a significant potential for a level of doubt in the jury's verdict that would prohibit conviction under our concept of due process. In order to remedy this problem, the courts should require a substantial majority of the jurors to specifically agree on the predicate acts that constitute the "continuing series." To implement this requirement, courts should encourage the use of special verdicts in CCE cases where the juror non-concurrence problem arises.[325] Such a requirement would benefit the government and criminal defendants alike, without being unduly burdensome. Special verdicts would eliminate the uncertainty that general verdicts promote in CCE cases. Such findings would also prevent any potential problems regarding whether a CCE conviction could stand after some of the predicate act convictions were vacated. Consequently, the government would benefit due to a decreased risk of unjustified acquittals because a defendant would only be acquitted of the CCE charge if the vacated convictions represented the acts upon which the jury had relied to find a continuing series. Special verdicts on the "continuing series" element of CCE would not usurp any of the jury's functions because the court would still instruct the jury on the requirements for CCE conviction, leaving them to independently balance rules of law with fairness on each issue.

As congressional legislation becomes more sophisticated, it is imperative that the criminal defendant's constitutional rights to due process of law not fall by the wayside. The CCE statute's primary purpose is to punish the drug lords, not their subordinates. Allowing significant juror divergence on the predicate acts constituting the statute's "continuing series" element would disrupt that very purpose and intrude on the CCE defendant's constitutional right to due process of law.

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324. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1940 (1992).

325. *See supra* notes 195-200 and accompanying text.